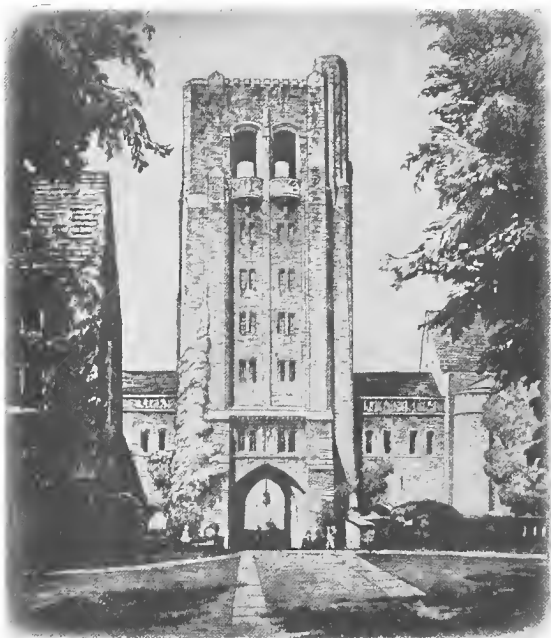


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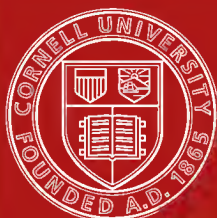
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PRINCIPLES
OF THE
LAW OF REAL PROPERTY

FOR THE
USE OF STUDENTS.

BY
GEO. W. WARVELLE, LL. D.,

DEAN OF THE CHICAGO LAW SCHOOL; AUTHOR OF A TREATISE ON ABSTRACTS
OF TITLE; THE LAW OF VENDOR AND PURCHASER, ETC.

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TO
HON. MURRAY F. TULEY,
ONE OF THE
JUDGES OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS,
THIS VOLUME IS INSCRIBED, AS A TRIBUTE
OF RESPECT, BY THE AUTHOR.

PREFACE.

The present volume is the outgrowth of the writer's own wants in practical educational work, and is offered as a course text-book on the subject of Real Property, as same is now included and grouped in the curricula of the standard American law schools.

While there are many excellent treatises upon the law of Real Property, yet, in the main, they are too comprehensive in scope and diffuse in detail for effective work in the classroom. In this unpretentious compilation the writer has endeavored to condense and simplify the elementary rules and principles, and by a system of logical development to afford a clear perception of those abstruse phases of the subject that are usually found so perplexing to beginners. No attempt has been made to show the historical evolution of the subject or to note the changes which same has undergone, other than incidental allusions, nor has the writer ventured, save in rare instances, to enter into any discussion of the matters involved or to present his own views with respect thereto. In all cases the principles, rules and definitions have been stated as tersely and concisely as circumstances would permit, the intention being that the text should serve only as the foundation or groundwork of lectures and exposition by the instructor.

Much that is undoubtedly germane to the subject has been intentionally omitted, for the reason that same can be more

advantageously studied in connection with other branches of the course. Thus, many of the questions growing out of the relation of Vendor and Purchaser are a part of the elementary law of contracts, and should be covered in that course; and in like manner the course in Equity will include a number of the special topics that usually find a place in the ordinary treatise on Real Property. Continuity of design has in some places rendered necessary a passing allusion to these subjects, but as a rule they have been avoided.

While this book is primarily intended for the use of students pursuing a prescribed course under an instructor and to be employed in connection with other works of a like elementary character, it is yet believed that it will be found equally serviceable in private study. In its preparation free use has been made of the author's other legal writings, but the plan of the work and development of the subject are entirely new.

The writer is fully conscious of the failings and imperfections of his work, yet ventures to hope that upon trial it may not be found without merit; and emboldened by the favorable reception that has been accorded to all his former efforts, he now presents this primer for the inspection, and, it is hoped, approval, of the legal educators of the United States.

G. W. W.

CHICAGO LAW SCHOOL, Oct. 12, 1896.

ANALYSIS

OF THE

CONTENTS OF THIS VOLUME.

CHAPTER I.

THE NATURE OF REAL PROPERTY.

Generally considered and classified	1
I. Corporeal hereditaments	3
Generally considered	3
Land	4
Minerals	4
Oils and gases	5
Growing crops	6
Trees and herbage	6
Manure	7
Houses and buildings	7
Fixtures	8
Water	10
Ice	11
Church pews	12
Corporation stock	13
II. Incorporeal hereditaments	14
Generally considered	14
Appurtenances	15
Easements	16
Profits a prendre	19
Licenses	20
Franchises	21
Burial lots	22

CHAPTER II.

ESTATES IN REAL PROPERTY.

Defined and classified	23
I. Considered with respect to the quantity of interest possessed	
by the tenant	24
1. Estates of freehold	25
In fee-simple	25
In fee-tail	26

I. Considered with respect to the quantity of interest possessed by the tenant — <i>continued.</i>	
1. Estates of freehold — <i>continued.</i>	
For life	27
Dower	29
Curtesy	31
Homestead	32
2. Estates less than freehold	33
For years	34
At will	35
By sufferance	35
II. Considered with respect to the time of their enjoyment . .	36
In possession	36
In remainder	37
In reversion	38
III. Considered with respect to the number and connection of the tenants	39
In severalty	39
In joint tenancy	39
By entirety	40
In common	42
IV. Considered with respect to the manner of their enjoyment .	44
Absolutely	44
On condition	46
Defined	47
Effect of	50
Conditional limitation	51
Equitable estates	52
Uses	53
Trusts	54
Powers	56
Merger of estates	57

CHAPTER III.

TITLE TO REAL PROPERTY.

Defined and classified	59
I. Original title	60
Generally considered	60
Sources of	63
Occupancy	64
Discovery	65
Conquest	66
Cession	66

II. Derivative title	67
Generally considered and classified	67
1. By descent	68
Nature and incidents	68
(1) Through consanguinity	71
Definition and nature	71
Right of succession	73
Right of representation	74
Preferences	75
Aliens	75
Coparceners	76
(2) Through affinity	76
Defined and distinguished	76
(3) Through adoption	77
Defined and distinguished	77
Right of succession	79
2. By purchase	80
1. Through act of the parties	80
(1) By way of grant	80
(a) Public grant	81
Patent	81
Legislative act	83
(b) Private grant	85
Deed	85
Dedication	86
(c) Confirmation	88
Nature and operation	88
(2) By way of devise	89
Nature, operation and effect	90
2. Through operation of law	92
(1) Resulting from natural causes	92
Accretion	92
Reliction	94
Avulsion	94
(2) Resulting from political and civil relations	95
Eminent domain	95
Escheat	97
Confiscation	98
Forfeiture	99
Tax titles	100
(3) Resulting from public policy	102
Estoppel	102
By record	103
By deed	103
Prescription	105
Limitation	106
Relation	110

CHAPTER IV.

THE PARCELING OF LANDS.

Generally considered	112
Divisions of the public domain	113
Subdivision of sections	115
System of rectangular surveying	117
Meander lines	118
Plats and subdivision	119
Formal requisites of plats	120
Registration of plats	120
Vacation and cancellation of plats	121
Dedication by plat	121

CHAPTER V.

THE CONVEYANCE OF REAL PROPERTY.

Generally considered	124
Forms of conveyance	124
Incidents of deeds	125
1. Writing and arrangement	126
General rules	126
2. The parties	128
Generally considered	128
(a) Persons sui juris	130
Generally	130
Partners	130
Corporations	131
(b) Persons under disability	135
Aliens	135
Infants	136
Married women	138
(c) Persons incompetent	138
Lunatics	138
Imbeciles	138
(d) Fiduciaries	141
Generally	141
Trustees	142
Executors and administrators	143
Guardians	144
Legal officials	144
3. The consideration	145
Operation and effect of	145
4. The subject-matter	147
Generally	147
(a) The land conveyed	148
General principles	148
Rules of construction	149

4. The subject-matter — <i>continued.</i>	
(a) The land conveyed — <i>continued.</i>	
Boundary lines	151
Exceptions and reservations	152
Land held adversely	153
(b) The estate conveyed	154
Generally	154
Creation of estate in fee	155
Creation of life estates	156
Rule in Shelley's case	158
Defined by Kent	159
Defined by Preston	159
Future estates	160
5. The covenants	162
Generally considered	162
Creation of covenants	163
In statutory deeds	165
Construction of covenants	165
Common covenants	166
Covenants running with the land	168
6. The conditions	170
Generally	170
Creation of conditions	171
Operation and effect	173
Conditions in restraint of alienation	174
7. Signing	175
Method of signing	175
8. Sealing	177
Method of sealing	178
9. Attestation	179
Nature and effect of attestation	179
10. Acknowledgment	180
Nature and effect of acknowledgment	180
Requisites of acknowledgments	181
Ancient deeds	183
11. Delivery	183
Theory of delivery	184
Manner of delivery — Presumptions	184
Revocation and redelivery	186
Delivery in escrow	187
12. Registration.	188
General principles	188
Effect of recording acts	189
Loss or destruction of records	191
b	

13. Minor incidents	191
The date	191
Words of grant	192
The habendum	194
Validity — Construction	194
Technical phrases	196

CHAPTER VI.

FORMS OF CONVEYANCE.

Generally considered	198
1. Governmental or public conveyances	199
Forms of public grant	199
(a) Public conveyances of proprietary lands	200
Generally	200
Patents defined	201
Patents from the United States	201
Continued — Delivery	202
General land office record	203
Construction	204
Patents from the state	205
Legislative grants	205
Construction of legislative grants	206
Formal requisites	207
(b) Public conveyances of forfeited lands	207
Generally considered	207
Nature of taxation	207
Tax sales	209
Tax deeds	209
Continued — Statutory modification	210
Continued — Formal parts	212
2. Individual or private conveyances	213
Defined and classified	213
(a) Conveyances derived from the statute of uses	214
Nature and effect	214
Warranty deeds	216
Quitclaim deeds	217
Effect of covenants in quitclaim deeds	219
Special warranties	220
Statutory forms	221
(b) Conveyances derived from the common law	222
Generally considered	222
Release	223
Confirmation	224
Surrender	225

2. Individual or private conveyances — *continued*.Defined and classified — *continued*.(b) Conveyances derived from the common law — *continued*.

Assignment 225

Continued — Voluntary assignments 226

Continued — Formal requisites 227

(c) Conveyances by delegated authority 228

General principles — Powers 228

Powers of attorney 230

Revocations 231

Substitution 233

Execution of power by attorney 232

Powers of appointment 234

(d) Conveyances in trust 234

Nature and effect 234

Creation of trust 235

Declaration of trust 236

Resulting trusts 237

Removal of trustees 238

Resignation — Refusal to act 239

(e) Conveyances by way of pledge 239

Generally considered 239

Modern doctrine of mortgages 241

Different kinds of mortgages 242

The equity of redemption 243

Mortgages proper 244

Trust deeds 244

Equitable mortgages 245

Vendor's lien 248

Statutory forms 248

Mortgages of homestead 249

Mortgage of after-acquired property 250

Effect of informality in mortgages 251

Covenants in mortgages 252

Effect of special covenants 253

Special stipulations and conditions 253

Record of mortgages 254

Power of sale 255

Assignment of mortgage 257

Operation and effect of assignments 258

Formal requisites of assignments 258

Release and satisfaction 260

Form and requisites of release 260

Release by trustee 261

Marginal discharge 262

Foreclosure 263

2. Individual or private conveyances—*continued.*Defined and classified—*continued.*

(f) Conveyances of chattels real	263
Generally considered	263
Creation of a term	265
Property subject to lease	266
Covenants and conditions	266
Implied covenants	267
Assignment of lease	268
3. Fiduciary or official conveyances	269
Defined and distinguished	269
(a) Conveyances by trustees	271
Trustees' deeds generally	271
When purchaser must see to application of purchase-	
money	272
Mortgagees' deeds	273
Executors' deeds	274
Administrator with will annexed	275
Trustees cannot become purchasers	276
Continued—Exceptions to the rule	277
(b) Conveyances by executive and ministerial officers	277
Sources of authority	277
Title under execution sale	278
Sheriff's deed—On execution	279
Continued—Acknowledgment	280
Continued—Operation and effect	281
Statutory sheriffs' deeds	282
Judicial sales—Validity and effect	282
Title under judicial sale	283
Order of confirmation	284
Sheriff's deed—Under decree	285
Masters', commissioners' and referees' deeds	285
Administrators' deeds	286
Guardians' deeds	287

CHAPTER VII.

TESTAMENTARY CONVEYANCES.

Generally considered	289
1. Making and revocation of wills	290
Formal requisites	290
The residuary clause	291
Codicils	292
Revocation	293

2. Operation and effect of wills	294
Rules of construction	294
Repugnancy	296
Devises to heirs — Effect of	297
Words of grant	298
Words of purchase and limitation	299
Rule in Shelley's case	300
Interpretation of words and phrases	301
Words which pass real estate	302
Limitations and remainders	304
Devise to a class	305
Gift of the income of realty	305
Devise with power of disposition	306
Indeterminate devise	309
Devise on condition precedent	310
Conditional devise — Marriage	310
Continued — Contingent remainder	311
Possible reversion	312
Devise to married woman	312
Devises to executors in trust	312
Bequest to devisee by description	314
Precatory trusts	314
Perpetuities	316
Lapsed devise	316
Devises for payment of debts	317
Charges on lands devised	317
Equitable conversion	319
3. Proof of wills	319
Generally	319
Probate of wills	320
Effect of probate	320
Foreign probate	321

TABLE OF CASES.

The references are to the pages.

- Abbott v. Holway, 3.
Abbott v. Chandler, 161.
Abbott v. Dolling, 209, 213.
Abercrombie v. Abercrombie, 296.
Adams v. Morse, 152.
Adams v. Buchanan, 281.
Adams v. Ross, 155.
Adginton v. Hefner, 260.
Agricultural Society v. Paddock, 135.
Aiken v. Railroad Co., 58.
Akers v. Akers, 301.
Albert v. Burbank, 186.
Alexander v. Tolleston Club, 133.
Alexander v. Polk, 178.
Alexander v. Alexander, 185.
Allard v. Lane, 260.
Allen v. Cook, 33.
Allen v. Armstrong, 210, 211.
Allen v. Jaquish, 34.
Allen v. Holton, 220.
Allen v. Pool, 70.
Allen v. Culver, 267.
Allen v. Berryhill, 139.
Allen v. Sales, 280.
Allen v. Bates, 149.
Allen v. Kennedy, 169.
Allman v. Taylor, 282.
Altes v. Hinckler, 101.
Am. Emigrant Co. v. Clark, 193.
Am. Bible Society v. Sherwood, 134.
Amphlet v. Hibbard, 249, 250.
Anderson v. Cary, 175.
Anderson v. McGowan, 275.
Anderson v. Culbert, 249.
Anderson v. Grable, 316.
Andrews v. Boyd, 40.
Andrews v. Davison, 167.
Annan v. Baker, 213.
Appleton v. Boyd, 40.
Armentrout's Ex'r v. Gibbons, 247, 248.
Armstrong v. Darby, 168.
Armstrong v. Stovall, 183.
Armstrong v. Lear, 320.
Arthur v. Anderson, 129.
Arthur v. Webster, 131.
Arthur v. Call, 311.
Astor v. Hoyt, 241.
Atkins v. Kinman, 212, 280.
Atlantic Dock Co. v. Leavitt, 49, 103.
Attorney-General v. Garrison, 239.
Attorney-General v. Plankroad Co., 208.
Atwater v. Bodfish, 19.
Austin v. Swank, 33.
Austin v. Bailey, 69.
Austin v. Seminary, 138.
Austin v. Downer, 247.
Austin v. Cambridgeport Parish, 268.
Aven v. Beckom, 270.
Avery v. Pixley, 294.
Ayer v. Ayer, 306.
Ayers v. Hays, 258, 262.
Ayling v. Kramer, 50.

- Bacon v. Van Schoonhoven, 258, 261.
 Bailey v. Bailey, 238.
 Bailey v. Smith, 258.
 Bainway v. Cobb, 10.
 Baker v. Scott, 300, 301.
 Baker v. Swann, 108.
 Baker v. Bridge, 309.
 Baker v. Neff, 133.
 Baldwin v. Sager, 258.
 Balkum v. Wood, 249.
 Baliane v. Tesson, 84.
 Ballou v. Lucas, 218.
 Bank v. Billings, 102.
 Bank v. Anderson, 258.
 Bank v. Rice, 129.
 Bank v. Humphreys, 285.
 Bank v. Moore, 138.
 Bank v. Davis, 174.
 Bank v. Willis, 227.
 Bank v. Lanahan, 243.
 Bank v. Drummond, 247.
 Bank v. Clapp, 250.
 Banks v. Haskie, 267.
 Barber v. Harris, 157.
 Barbour v. Scottish Am. Mfg. Co., 262.
 Barheydt v. Barheydt, 309, 310.
 Barker v. Dayton, 32, 46.
 Barnard v. Campau, 190.
 Barnet v. Lachman, 131.
 Barnet v. Praskauer, 181.
 Barney v. Leeds, 32.
 Barney v. Keokuk, 61, 62.
 Barnhard v. Pope, 42.
 Barnhart v. Campbell, 40.
 Barnhizel v. Ferrell, 78.
 Barry v. Gamble, 82.
 Barrett v. Bell, 15.
 Barter v. Greenleaf, 147.
 Bartholemew v. Hamilton, 10.
 Bartlett v. King, 298.
 Bass v. Estill, 181, 190.
 Bassett v. Bassett, 147.
 Bassett v. Lockard, 278.
 Batchelder v. Keniston, 94.
 Bates v. Selley, 42.
 Bates v. Ball, 141.
 Bates v. Ableman, 228.
 Batesville Institute v. Kauffman, 238.
 Baugher v. Merryman, 247.
 Baxter v. Arnold, 119.
 Bayliss v. Williams, 146.
 Beach v. Beston, 226.
 Beacroft v. Straum, 304.
 Beall v. White, 251.
 Beaman v. Whitney, 182.
 Bear v. Ritzer, 6.
 Bearss v. Ford, 242, 246.
 Beatty v. Mason, 102, 107.
 Beaty v. Kurtz, 122.
 Bedell v. Shaw, 108.
 Beecher v. Hicks, 158.
 Beekman v. Frost, 254.
 Behrens v. McKinzie, 139.
 Belcher v. Branch, 275.
 Belden v. Meeker, 320.
 Bell v. Simpson, 257.
 Bell v. Duncan, 82.
 Bell v. Humphrey, 295, 297.
 Bell v. Twilight, 220.
 Bellsay v. Engel, 160.
 Benedict v. Morse, 37.
 Benker v. Jacoby, 306.
 Bennett v. Saloman, 258.
 Benson v. Morrow, 62, 93.
 Benson v. Humphreys, 197.
 Bergan v. Cahill, 295.
 Berger v. Bennett, 256.
 Berlin v. Melhorn, 284.
 Berry v. Derwart, 147.
 Bertles v. Nunan, 42.
 Best v. Gholson, 249.
 Bethel v. Bethel, 282.
 Betsey v. Torrence, 154.
 Beverly v. Walden, 140.
 Bickford v. Page, 166.
 Biglow v. Forrest, 99.
 Biglow v. Gillott, 292.

- Billings v. Stark, 186.
 Binghamton Bridge, 206.
 Birdsall v. Hewlett, 317, 318.
 Biscoe v. Coulter, 211.
 Bishop v. O'Connor, 70, 270, 287.
 Bishop v. Morgan, 149.
 Bishop v. Snyder, 190.
 Bissell v. Railroad Co., 151.
 Bivard v. Walker, 128.
 Black v. Gregg, 251.
 Blacklaws v. Milne, 73.
 Blackwell v. Barnett, 260.
 Blair v. Osborne, 129.
 Blair v. Vanblarcum, 158, 312.
 Blagge v. Mills, 308, 309.
 Blake v. Williams, 257.
 Blake v. Fish, 191.
 Blake v. Stone, 300.
 Blakely v. Bestor, 211.
 Blanchard v. Brooks, 220.
 Blanchard v. Maynard, 295.
 Blankenship v. Stout, 137.
 Blauvelt v. Ackerman, 275.
 Blayton v. Merritt, 231.
 Blondeau v. Sheridan, 169.
 Blood v. Blood, 190.
 Board of Missions v. Nelson, 294.
 Boardman v. Bourne, 211.
 Boardman v. Reed, 205.
 Boerum v. Schenck, 275, 277.
 Boggs v. Merced Co., 5.
 Bogie v. Bogie, 185.
 Bogy v. Shoab, 220.
 Bohn v. Barrett's Ex'r, 298, 315.
 Bohon v. Bohon, 161.
 Boorman v. Sunnuchs, 94, 118.
 Booth v. Terrell, 37.
 Boothby v. Hathaway, 167.
 Borland v. Walrath, 184.
 Bostick v. Blades, 310, 311.
 Bostwick v. Atkins, 137.
 Botsford v. Wilson, 218.
 Bowen v. Thrall, 220.
 Bowman v. Lee, 107.
 Bowman v. Cockerill, 211.
 Bowman v. Davis, 279.
 Boyd v. McKenny, 137.
 Boyd v. Slayback, 185.
 Boynton v. Hubbard, 161.
 Boynton v. Rees, 146.
 Brackett v. Gilmore, 209.
 Bradford v. Howell, 159.
 Bradford v. Dawson, 182.
 Bradleys Fish Co. v. Dudley, 18.
 Bradner v. Faulkner, 6.
 Bradshaw v. Bradbury, 150.
 Bradshaw v. Bradshaw, 196.
 Bradstreet v. Clark, 50, 171, 296.
 Brady v. Spruck, 217.
 Brain v. Renshaw, 197.
 Brakely v. Sharp, 19.
 Branger v. Lucy, 70.
 Brannon v. May, 77.
 Brantley v. Chuley, 277.
 Brattle Square Church v. Grant, 269.
 Braxton v. Bussler, 152.
 Breckenridge v. Ormsby, 138.
 Breckenridge v. Todd, 186, 192.
 Brennan v. Wilson, 142.
 Brewster v. Hardy, 161.
 Brewton v. Watson, 193.
 Bridge v. Wellington, 193, 216.
 Brinton v. SeEVERS, 183.
 Britton v. Lorentz, 227.
 Broadwater v. Darne, 141.
 Brock v. Frank, 320.
 Brodie v. Watkins, 193, 216.
 Brolasky v. Furey, 183.
 Bromley v. Goodrich, 196.
 Bronson v. Coffin, 168, 173.
 Brooke v. Filer, 135.
 Brooks v. Bruyn, 108.
 Brower v. Fisher, 141.
 Browing v. Harris, 249.
 Brown v. Lawrence, 37.
 Brown v. Dean, 246.
 Brown v. Wood, 42.
 Brown v. Delaney, 256.
 Brown v. United States, 98.
 Brown v. Clark, 292.

- Brown v. Welch, 145.
 Brown v. Brown, 311.
 Brown v. Staples, 168.
 Brown v. Brown, 185, 311.
 Brown v. Manter, 193.
 Brown v. Brown, 196.
 Brown v. Coal Oil Co., 217.
 Brown v. Jackson, 220.
 Brown v. Pforr, 230.
 Brown v. Thorndike, 298.
 Brownfield v. Wilson, 295.
 Brumfield v. Carson, 13.
 Brush v. Wilkins, 294.
 Bryan v. Bradley, 3.
 Bryan v. Ramirez, 183.
 Bryant v. Christian, 307.
 Buchan v. Hart, 238.
 Buchanan v. Curtis, 87.
 Buckingham v. Jacques, 74.
 Buckingham v. Wisson, 274.
 Buckman v. Buckman, 151.
 Buckout v. Swift, 8.
 Buell v. Irwin, 182.
 Bull v. Bull, 313.
 Bull v. Fallett, 163.
 Bullock v. Battenhausen, 254, 255.
 Bunch v. Hardy, 157.
 Bundy v. Iron Co., 128.
 Burbank v. Pillsbury, 173.
 Burch v. Burch, 90, 318.
 Burgess v. Pollock, 140.
 Burkholder v. Cased, 185.
 Burleigh v. Clough, 57, 304, 306.
 Burlington University v. Barrett, 290.
 Burnet v. Burnet, 292.
 Burns v. Keas, 32.
 Burrage v. Smith, 167.
 Burtners v. Keran, 103.
 Burton v. Le Roy, 179.
 Busch v. Donohue, 206.
 Busey v. Reis, 145.
 Busey v. Hardin, 285.
 Bush v. Stevens, 146.
 Butcher v. Rogers, 193.
 Butler v. Huestis, 160, 172, 295, 301.
 Butterfield v. Haskins, 304.
 Button v. Am. Tract Society, 314.
 Byars v. Spencer, 183.
 Cabell v. Grubbs, 183.
 Cable's Appeal, 315, 317.
 Cadwallader v. West, 140.
 Cain v. Warford, 140.
 Cahill v. Palmer, 107.
 Cahoon v. Coe, 209.
 Calcord v. Alexander, 149.
 Caldwell v. Fulton, 5.
 Caldwell v. Caldwell, 296.
 Calkins v. Lockwood, 55.
 Callanan v. Hurley, 211.
 Callins v. Lavalley, 193, 194, 195, 197.
 Callis v. Day, 137.
 Calumet Co. v. Russell, 181.
 Cameron v. Logan, 278.
 Cameron v. Supervisors, 96.
 Camp v. Douglass, 166.
 Campbell v. Ware, 74.
 Campbell v. Wiggins, 298.
 Campbell v. Johnson, 149.
 Campbell v. Campbell, 233.
 Campbell v. Elliot, 249.
 Canfield v. Ford, 3.
 Canfield v. Bostwick, 91.
 Capehart v. Drury, 284.
 Capen v. Peckham, 9.
 Carlisle v. United States, 45.
 Carlisle v. Carlisle, 182.
 Carpenter v. Brown, 241.
 Carpenter v. Mitchell, 248.
 Carpenter v. Underwood, 228.
 Carpenter v. Sherfy, 279.
 Carpenter v. Browning, 296.
 Carpentier v. Williamson, 217.
 Carr v. Carr, 246.
 Carr v. Ellison, 267.
 Carroll v. Gillien, 107.
 Carroll v. East St. Louis, 181.
 Carroll v. Carroll, 320.
 Carter v. Burley, 178.

- Carter v. Wise, 217, 218.
 Cartney v. Bostwick, 238.
 Carver v. Southain, 165, 221.
 Cary v. Daniels, 11.
 Case v. Coddling, 238.
 Casebolt v. Donaldson, 32.
 Cate v. Cranor, 296, 303.
 Catlin v. Kidder, 42.
 Cavanaugh v. Peterson, 255.
 Cave v. Crafts, 15.
 Chadwick v. Haverhill Bridge, 22.
 Chalker v. Chalker, 50.
 Challefoux v. Ducharme, 83, 89.
 Challis v. Railroad Co., 97.
 Chambers v. Jones, 286.
 Chambers v. St. Louis, 134.
 Chambers v. Cox, 249.
 Champaign v. Harmon, 134.
 Champlain v. Pendleton, 151.
 Champlin v. Haight, 272.
 Chandler v. Chandler, 161.
 Chandler v. Spear, 212.
 Chapin v. Curtenius, 144, 288.
 Chapin v. Harris, 172.
 Chapin v. Gilbert, 315.
 Chapman v. Gray, 35.
 Chapman v. Kimball, 167.
 Charles v. Waugh, 209.
 Charles River Bridge v. Warren,
 204.
 Chase v. Whiting, 270.
 Chase v. Weston, 169.
 Chase v. Ross, 287.
 Cheever v. Perley, 260.
 Chess-Carley Co. v. Purtell, 157.
 Chessman v. Whittemore, 187.
 Chicago v. Larned, 102, 208.
 Chiles v. Conley's Heirs, 193.
 Chope v. Lorman, 103.
 Chouteau v. Eckhart, 206.
 Christie v. Gage, 109.
 Chubb v. Johnson, 69.
 Church v. Wells, 13.
 Church v. Gilman, 183.
 Churchill v. Reamer, 172, 194.
 Cincinnati v. White, 87.
 City of Alton v. Transportation Co.,
 194.
 Clader v. Thomas, 190.
 Clafin v. Carpenter, 6.
 Claiborne v. Holmes, 191.
 Clapp v. Stoughton, 312.
 Clark v. Boorman's Ex'rs, 300.
 Clark v. Sawyer, 280.
 Clark v. Baker, 250.
 Clark v. Owings, 27.
 Clark v. Martin, 49, 171, 173.
 Clark v. Clark, 142.
 Clark v. Wethy, 150.
 Clark v. Conner, 211.
 Clark v. Graham, 230.
 Clark v. Henry, 246.
 Clark v. Tennison, 304, 310.
 Clarke v. Swift, 168.
 Clarke v. Rowan, 209.
 Clarke v. Ransom, 294.
 Cline v. Jones, 184.
 Clery v. Hinman, 99.
 Coats v. Taft, 149.
 Coburn v. Ames, 62.
 Coburn v. Ellenwood, 207.
 Coffin v. Taylor, 258.
 Cogger v. Lansing, 188.
 Colburn v. Mason, 42.
 Cole v. Hughes, 169.
 Cole v. Kimball, 169.
 Coleman v. Railroad Co., 132.
 Coleman v. Improvement Co., 149,
 150.
 Coles v. Withers, 248.
 Collame v. Langdon, 244.
 Collier v. Grimsey, 305, 306.
 Collier's Case, 310.
 Collins v. Marcy, 171.
 Collins v. Lavalle, 172.
 Collins v. Bartlett, 201.
 Commonwealth v. Alger, 46.
 Commonwealth v. Tewksbury, 46.
 Commonwealth v. Roxbury, 65.
 Commonwealth v. Rush, 123, 131.

- Comstock v. Smith, 218, 219.
 Congregational Meeting House v. Hilton, 265.
 Congregational Society v. Stark, 135.
 Conlan v. Grace, 175.
 Connard v. Colgen, 185.
 Conner v. Banks, 257.
 Connor v. Whitmore, 259.
 Conrad v. Waples, 135.
 Cook v. Berlin Mill Co., 276.
 Cook v. Holmes, 297, 309.
 Cook v. Stearns, 21.
 Cook v. Commissioners, 96.
 Cook v. Barr, 236, 237.
 Cook v. Clark, 254.
 Coolidge v. Learned, 106.
 Coon v. Bricket, 50.
 Cooper v. Cooper, 160.
 Corbin v. Healy, 194.
 Corbin v. Sullivan, 189.
 Cormack v. Patchin, 208.
 Corwin v. Merrett, 286.
 Costigan v. Gould, 191.
 Covenhoven v. Shuler, 297.
 Covington v. Stewart, 110.
 Cowell v. Col. Springs Co., 49, 171, 174.
 Cowles v. Rickett, 226.
 Cowles v. Marble, 243, 256.
 Cox v. Friedley, 152.
 Cox v. James, 119.
 Cox v. Baker, 13.
 Cox v. Cox, 75.
 Craddock v. Stewart's Adm'r, 270.
 Craig v. Willis, 171.
 Craig v. Radford, 76.
 Craig v. Leslie, 317.
 Cramer's Appeal, 74.
 Crane v. Turner, 258.
 Crane v. Reeder, 154.
 Cranston v. Crane, 255.
 Credle v. Hays, 149, 150.
 Crippen v. Dexter, 320.
 Crocker v. Ballangee, 196.
 Croft v. Bunster, 146, 241, 257.
 Croker v. Gilbert, 146.
 Cronise v. Hardt, 274.
 Croodle v. Ingraham, 30.
 Crosby v. Parker, 197.
 Croxdle v. Shererd, 38.
 Crump v. Faucett, 75.
 Cryder's Appeal, 272.
 Cummings v. Powell, 136.
 Cummings v. Woodruff, 179.
 Cunningham v. Curtis, 149.
 Curran v. Taylor, 74.
 Currier v. Gale, 25.
 Curtis v. Smith, 143, 233.
 Curtis v. Hunting, 203.
 Cushman v. Glover, 231.
 Cutler v. Tufts, 195.
 Cutler v. Davenport, 259.
 Dale v. Thurlow, 181.
 Dale v. Lincoln, 185.
 Dan v. Brown, 294.
 Danforth v. Lowry, 235.
 Daniel v. Purvis, 84.
 Daniel v. Whartenby, 299.
 Damon v. Bibben, 303.
 Dark v. Johnston, 6.
 Darst v. Bates, 192.
 Dartmouth College v. Woodward, 206.
 Davenport v. Whitsler, 128.
 Davenport v. Davenport, 169.
 Davis v. Hamilton, 247.
 Davis v. Leyman, 172.
 Davis v. Savings Bank, 231.
 Davis' Heirs v. Taul, 316.
 Dawson v. Smith, 294.
 Day v. Micou, 99.
 Dean v. Bittner, 83, 84, 206.
 Dearing v. Thomas, 33.
 Deerfield v. Arms, 94.
 Deford v. Deford, 91.
 De Camp v. Dobbins, 133.
 De Haro v. United States, 21.
 Deininger v. McConnell, 186.
 De Kay v. Irving, 295.

- De Lancy v. Ganong, 267.
Delano v. Blake, 137.
Delano v. Bennett, 259.
De Laureat v. Kemper, 262.
Demarest v. Willard, 170.
Den v. Messenger, 310.
Den v. Johnson, 34.
Den v. Despreaux, 279.
Den v. Trautman, 261.
Den v. Taylor, 279.
Dennett v. Dennett, 28.
Denning v. Smith, 210.
Denton v. Jackson, 134.
De Peyster v. Michael, 174.
Dequish v. Williams, 111.
Dewey v. McLain, 99.
Devries v. Haywood, 104.
De Wolf v. Hayden, 219.
Dexter v. Manley, 268.
Dexter v. Hall, 138.
Dickie v. Carter, 293.
Dickins v. Barnes, 149.
Dickson v. Rawson, 226.
Dikes v. Miller, 94.
Dillaye v. Greenough, 235.
Dillman v. Hoffman, 18.
Dills v. Hubbard, 109.
Dingley v. Buffum, 35.
Dingley v. Bank, 247.
Dingman v. People, 206.
Disque v. Wright, 254.
Dixon v. Merritt, 103.
Dixon v. Cook, 107.
Dodge v. Stevens, 277.
Dodge v. Beeler, 75, 77.
Dodge v. Hopkins, 231.
Doe v. Gouverneur, 76.
Doe v. Robertson, 135.
Doe v. Hardy, 144.
Doe v. Horr, 147.
Doe v. Jackson, 288.
Dolde v. Vodicka, 119.
Dole v. Thurlow, 179.
Donahue v. Chase, 273.
Donahue v. Hubbard, 103.
Donald v. Gregory, 103.
Donald v. Bear River Co., 233.
Donlin v. Bradley, 288.
Donnelly v. Turner, 298.
Dooley v. Crist, 4.
Dorr v. Harrahan, 49.
Dorsey v. Kendall, 282.
Dorsey v. Railroad Co., 168.
Douglass v. Scott, 102.
Douthitt v. Stinson, 128.
Dow v. Lewis, 193.
Downey v. Borden, 306.
Drake v. Kimball, 32.
Draper v. Bryson, 282.
Draton v. Marshall, 241.
Driggs v. Davis, 226.
Drusadow v. Wilde, 305.
Dryden v. Hanway, 238.
Ducat v. Chicago, 131.
Dudley v. Sumner, 85, 264.
Dufour v. Stacey, 22.
Dugan v. Follett, 109.
Dukes v. Spangler, 187.
Duncan v. Sylvester, 42.
Duulap v. Bullard, 269.
Dunleith v. Reynolds, 208.
Dunning v. National Bank, 275.
Dunning v. Van Dusen, 307, 308, 309.
Dunton v. Brown, 137.
Dunton v. Woodbury, 33.
Dupont v. Davis, 149.
Durette v. Briggs, 270.
Durham v. Williams, 151.
Duryea v. New York, 153.
Dwight v. Packard, 149.
Dwight v. Overton, 226.
Dyer v. Sanford, 19.
Dyson v. Bradshaw, 188.
Earl v. Rowe, 305.
Eaton v. Lyman, 167.
Eaton v. Trowbridge, 186.
Edwards v. Trumbull, 246.
Edwards v. Hale, 36.
Edwards v. Rays, 154.

- Edwards v. Barnard, 299.
 Egery v. Woodard, 183.
 Elliot v. Wood, 255.
 Elliott v. Morris, 237.
 Elliott v. Sleeper, 129.
 Elliott v. Armstrong, 237.
 Ellis v. Railroad Co., 245.
 Ellison v. Daniels, 259.
 Ellsworth v. Railroad Co., 186.
 Elmdorf v. Lockwood, 30, 31.
 Elwell v. Shaw, 232.
 Emans v. Turnbull, 106.
 Emmerson v. White, 74.
 Emmerson v. Simpson, 172.
 Emamison v. Whitelsey, 311.
 Emory v. Keighan, 260.
 English v. Porter, 140.
 Enyeart v. Kepler, 41.
 Equitable Trust Co. v. Fisher, 245.
 Eshleman's Appeal, 75.
 Estate of Utz, 301.
 Evans v. Hudson, 296.
 Evans v. Edwards, 146.
 Everts v. Agnes, 188.
 Evertson v. Sawyer, 86.

 Fairchild v. Fairchild, 43.
 Fairman v. Beal, 307.
 Fannin Co. v. Riddle, 105.
 Faris v. Dunn, 237.
 Farman v. Duffam, 182.
 Farnum v. Peterson, 154.
 Farrar v. Farrar, 187.
 Farrish v. Coon, 61, 105, 109, 303, 304.
 Farwell v. Jacobs, 275.
 Farwell v. Rogers, 154.
 Fast v. McPherson, 237.
 Fay v. Muzzey, 7.
 Fearing v. Swift, 299.
 Feaster v. Fleming, 279.
 Fell v. Young, 286.
 Fellows v. Heermans, 236.
 Feltman v. Butts, 295.
 Fenn v. Holmes, 82.

 Fergus v. Woodworth, 279, 283.
 Fergusen v. Miles, 281.
 Fergusen v. Ball, 137.
 Ferry's Appeal, 295.
 Fetrow v. Merriweather, 146.
 Field v. Seabury, 83.
 Finlay v. King's Lessee, 48.
 Finley v. Steele, 165, 216.
 Finley v. Brown, 212.
 Fire Ins. Co. v. Doll, 230.
 Fishback v. Weaver, 284.
 Fisher v. Hall, 184.
 Fisher v. Beckwith, 183.
 Fisher v. Fields, 56, 235.
 Fisher v. Butcher, 186.
 Fisher v. Kurtz, 109.
 Fisher v. Eslaman, 279.
 Fisk v. Frores, 270.
 Fitch v. Johnson, 169.
 Fitzgibbon v. Lake, 287.
 Flaniken v. Neal, 169.
 Fleming v. McHale, 238.
 Fletcher v. Peck, 66.
 Fletcher v. Holms, 241, 249, 250.
 Flickenger v. Shaw, 21.
 Florence v. Hopkins, 109.
 Floyd v. Herring, 286.
 Floyd v. Ricks, 178.
 Fogarty v. Finlay, 183.
 Fogg v. Clark, 302.
 Foley v. McDonald, 286.
 Folsom v. Carli, 33.
 Foltz v. Prouse, 69.
 Fonda v. Sage, 51.
 Fontaine v. Savings Institution, 186.
 Ford v. Wilson, 109.
 Forrest v. Jackson, 159.
 Forsyth v. Preer, 250.
 Foster v. Waterman, 79.
 Foster v. Young, 103.
 Fouby v. Fouby, 146.
 Foulk v. Coburn, 270.
 Fowle v. Merrill, 273.
 Fowler v. Shearer, 233.
 Fox v. Southack, 135.

- Fox v. Phelps, 309.
 Frances' Estate, 295, 302.
 Francis' Estate, 172.
 Franklin Co. v. Lewiston Inst. for Savings, 133.
 Fratt v. Whittier, 9, 10.
 Frazer v. Sup. of Peoria, 157, 312.
 Frazer v. Lee, 277.
 Frederick v. Haas, 238.
 Freed v. Brown, 139.
 Freedman v. Goodwin, 61.
 Fremont v. Flower, 81.
 French v. Edwards, 270.
 French v. Crosby, 30.
 French v. Wade, 99.
 French v. Burns, 243.
 Frey v. Drahos, 15, 16.
 Frink v. Darst, 219.
 Froneberger v. Lewis, 277.
 Frost v. Beekman, 190.
 Frost v. Deering, 175.
 Fugate v. Pierce, 107.
 Fuller v. Eddy, 241.
 Fulton v. Hill, 296.
 Funk v. Eggleston, 307, 308, 309, 318.
 Furgeson v. Jones, 79.
 Furgusen v. Mason, 162.
 Gadberry v. Sheppard, 171.
 Galloway v. Finley, 83.
 Galpin v. Abbott, 190.
 Galway v. Malchon, 254.
 Gammon v. Hodges, 191.
 Garanflo v. Cooley, 6.
 Gardiner v. Miller, 109.
 Gardner v. Jaques, 281.
 Gardner v. Gardner, 141, 175, 270.
 Gardner v. Grannis, 183.
 Gardner v. Moore, 251, 252.
 Gardner v. Heyer, 314.
 Garnett v. Garnett, 128.
 Garrison v. Rudd, 17.
 Gaskill v. Badge, 190.
 Gassett v. Kent, 131.
 Gates v. Caldwell, 162.
 Gavitt v. Chambers, 10.
 Gay v. Walker, 152, 153.
 Gayetty v. Bethune, 106.
 Gear v. Barnum, 151.
 Gernet v. Lynn, 109.
 Gibbons v. Hoag, 252, 273.
 Gibson v. Brockway, 8.
 Gibson v. Farley, 69.
 Gibson v. Chouteau, 82, 109, 111.
 Gibson v. Holden, 168, 169.
 Gilbert v. Holmes, 229, 230.
 Gilbert v. Chapin, 298.
 Gilcrist v. Rea, 275.
 Gilkey v. Hamilton, 274, 286.
 Gillham v. Mustin, 291.
 Gilmore v. Sapp, 202, 203.
 Gilpin v. Hollingsworth, 298.
 Glasscock v. Glasscock, 179.
 Glover v. Payn, 248.
 Goddard v. Chase, 9.
 Goddard v. Renner, 43, 130.
 Godfrey v. Alton, 121.
 Golder v. Brewster, 142, 143.
 Goodell v. Bates, 175.
 Goodman v. Randall, 175.
 Goodspeed v. Fuller, 145.
 Goodwin v. Baldwin, 260.
 Goodwin v. Goodwin, 263, 276.
 Gore v. McBrayer, 5.
 Gorham v. Arnold, 243.
 Gorman v. Stanton, 192.
 Gould v. Hendrickson, 281.
 Gould v. Day, 186.
 Gould v. Mather, 142.
 Gould v. Railroad Co., 151.
 Gove v. Cather, 183.
 Gowan v. Jones, 285.
 Graf v. Middleton, 217.
 Graham v. Anderson, 182.
 Grant v. Chase, 15.
 Grant v. Fowler, 109.
 Graves v. Rudd, 145.
 Graves v. Buren, 211.
 Gray v. Hayes, 157.

- Gray v. Blanchard, 171.
 Gray v. Ulrich, 180.
 Gray v. Brignardello, 283.
 Green v. Armstrong, 4.
 Green v. Phillips, 9.
 Green v. Marks, 33.
 Green v. Pettengill, 51.
 Green v. Green, 136.
 Green v. Leiter, 203.
 Greenfield Bank v. Crafts, 175.
 Gridley v. Hopkins, 123.
 Gridley v. Phillips, 144.
 Gridley v. Watson, 236.
 Griffin v. Roger, 226.
 Griffin v. Proctor, 249.
 Grignon's Lessee v. Astor, 84.
 Grimstone v. Carter, 247.
 Griswold v. Johnson, 42.
 Grogan v. San Francisco, 206.
 Grout v. Townsend, 147.
 Grover v. Hale, 143, 273.
 Groves v. Tucker, 187.
 Groves v. Cox, 310.
 Guano Co. v. Guano Co., 65.
 Guild v. Richards, 50.
 Guion v. Pickett, 57, 238.
 Gunton v. Zantzinger, 284.
 Guyer v. Smith, 135.
 Gwynn v. McCauley, 284.
 Gwynne v. Neiswanger, 210.
 Hadden v. Shontz, 194.
 Hale v. Gerrish, 137.
 Hale v. Woods, 233.
 Hall v. Jarvis, 83.
 Hall v. Hall, 90, 320.
 Hall v. Ashby, 154, 224.
 Hallett v. Wylie, 164, 172, 265, 267.
 Halloran v. Whitcomb, 104.
 Hallyburton v. Carson, 292, 393.
 Halsted v. Commissioners, 136.
 Ham v. Ham, 102.
 Hamilton v. Lubukee, 273.
 Hamilton v. Porter, 90.
 Hamilton v. Wright, 109, 263.
 Hamilton v. Doolittle, 217.
 Hamlin v. Express Co., 296, 297, 306.
 Hammelman v. Mounts, 194.
 Hammond v. Railway Co., 172.
 Hanford v. Blessing, 248.
 Hannon v. Christopher, 161.
 Hanson v. Vernon, 208.
 Hanson v. McCue, 11.
 Hardin v. Osborn, 186.
 Hardin v. Crate, 186, 192.
 Hardin v. Kirk, 182.
 Harding v. Tibbits, 102.
 Harman v. Oberdorfer, 186.
 Harpham v. Little, 278.
 Harriman v. Gray, 218.
 Harrington v. Fish, 180.
 Harrington v. Fortner, 251.
 Harris' Estate, 75.
 Harris v. Cannon, 137.
 Harris v. Harris, 177.
 Harris v. Fly, 317.
 Harrison v. Boring, 23.
 Harrison v. Simmons, 129, 182.
 Harrison v. Trustees of Phillips Academy, 192.
 Harrod v. Meyers, 136.
 Harryman v. Starr, 283.
 Hart v. Smith, 211.
 Hart v. Rust, 187.
 Hart v. Gregg, 161.
 Hart v. Chalker, 255.
 Hartman v. Kendall, 137.
 Hartshorn v. Dawson, 181.
 Haseltine v. Donohue, 179.
 Harvey v. Sullen's Heirs, 92.
 Haskell v. Seiver, 251.
 Haslem v. Lockwood, 7.
 Hastings v. Dollarhide, 137.
 Hastings v. Cutler, 190.
 Hatch v. Railroad Co., 95.
 Hatch v. Bates, 146.
 Hatch v. Hatch, 184.
 Haughwout v. Murphy, 145.
 Hawesville v. Lander, 151.
 Hawk v. McCullough, 193.

- Hawkins v. Champion, 26, 156.
 Hawley v. Northampton, 316.
 Hay v. Allen, 181.
 Hayden v. Stoughton, 91.
 Hayes v. Fergusen, 167.
 Hayes v. Lovingsston, 105.
 Haynes v. Bourn, 25.
 Hays v. Doaue, 9.
 Hayward v. Davison, 133.
 Hazel v. Hogan, 307.
 Hazlett v. Sinclair, 169, 173.
 Headley v. Gaundry, 261.
 Hemstreet v. Burdick, 230, 231.
 Henderson v. Railroad Co., 52.
 Henderson v. Whiting, 287.
 Henderson v. Ford, 231.
 Hendrichsen v. Hodgen, 185.
 Henley v. Hotling, 248.
 Henning v. Varner, 297.
 Hentch v. Hentch, 187.
 Herman v. Deming, 254.
 Herrick v. Stover, 296.
 Hetzel v. Barber, 57.
 Heuser v. Harris, 302.
 Hickman v. Perrin, 254.
 Hickman v. Quinn, 157.
 Hicks v. Skinner, 278.
 Higbee v. Rice, 189.
 Higgins v. Kusterer, 12.
 Hill v. Wentworth, 10.
 Hill v. Newman, 11.
 Hill v. Treat, 90.
 Hill v. Miller, 201.
 Hillis v. Hillis, 291.
 Himes v. Keighblinger, 185.
 Hines v. Perkins, 248.
 Hinman v. Booth, 188.
 Hinman v. Warren, 62.
 Hinsdale v. Thornton, 280.
 Hiscock v. Phelps, 43.
 Hitchcock v. Merrick, 258.
 Hobson v. Ewan, 279.
 Holbrook v. Debs, 219, 220, 222.
 Holbrook v. Dickinson, 208, 209.
 Holden v. Pinney, 33.
 Holden v. Mount, 70.
 Holloway v. Galloway, 291.
 Holmes v. Mead, 314.
 Holmes v. Self, 43.
 Holmes v. Jarret Moon, 157.
 Hooper v. Cummings, 172.
 Hoots v. Graham, 81.
 Hopper's Will, Re, 291.
 Horu v. Cole, 104.
 Hornbeck v. Westbrook, 129.
 Hosmer v. Campbell, 272, 273.
 Houck v. Yates, 118.
 Hough v. Land Co., 133.
 Houghton v. Hardenberg, 202.
 Housley v. Lindsay, 284.
 Houston v. Blackman, 147.
 Howard v. Huffman, 187.
 Howland v. Blake, 184.
 Howland v. Shurtleff, 260.
 Howe v. Batchelder, 6.
 Howe v. Howe, 185.
 Hoyt v. Kimball, 171, 173.
 Hrouska v. Janke, 180.
 Hubbard v. Shaw, 28.
 Hubbard v. Hubbard, 48, 50, 51.
 Hubbard v. Bell, 93, 152.
 Huber v. Gazley, 122.
 Hudson v. Poindexter, 179.
 Huebsch v. Schnell, 58, 146.
 Hughes v. Washington, 274.
 Hughes v. Watt, 279.
 Hunt v. Johnson, 146.
 Hunt v. Beeson, 48.
 Hunt v. White, 296.
 Hunt v. Hunt, 106, 302.
 Hunt v. Wright, 174.
 Hunter v. Vaughan, 238.
 Hunting v. Walker, 285.
 Huntington v. Asher, 20.
 Hunt v. Townshend, 142, 271.
 Hurd v. Cushing, 28.
 Hurley v. Estes, 242.
 Hutchens v. Doe, 279.
 Hutchins v. Carleton, 216.
 Hutchinson v. Hutchinson, 147.

- Hutchinson v. Railroad Co., 196.
 Hyde v. Warren, 256.
 Hydraulic Co. v. Bntler, 12.

 Ingle v. Jones, 275.
 Ingle v. Culbertson, 242.
 Ingraham v. Grigg, 228.
 Ingraham v. Hutchinson, 106.
 Insurance Co. v. Scales, 209.
 Insurance Co. v. Walsh, 171.
 Insurance Co. v. Eldredge, 261.
 Iron Co. v. Erie, 50.
 Irvine v. Irvine, 137.
 Irving v. Brownell, 182.
 Irwin v. Dixon, 121.

 Jackson v. White, 16.
 Jackson v. Meyers, 28, 155.
 Jackson v. Van Hoesen, 28.
 Jackson v. Parkhurst, 37.
 Jackson v. Tibbits, 42.
 Jackson v. Sanford, 43.
 Jackson v. Veeder, 57.
 Jackson v. Roberts, 57.
 Jackson v. Devitt, 58.
 Jackson v. Green, 76.
 Jackson v. Sanford, 130.
 Jackson v. Burchin, 138.
 Jackson v. Leek, 145.
 Jackson v. Dillon, 146.
 Jackson v. Sisson, 157.
 Jackson v. McKenny, 161.
 Jackson v. Swart, 163.
 Jackson v. Perkins, 185.
 Jackson v. Rowland, 188.
 Jackson v. Schoonmaker, 191.
 Jackson v. Bard, 191.
 Jackson v. Meyers, 194.
 Jackson v. Hudson, 194.
 Jackson v. Rosvelt, 195.
 Jackson v. Cary, 197.
 Jackson v. Roberts, 212.
 Jackson v. Esty, 210.
 Jackson v. Morse, 210.
 Jackson v. Wipslow, 218.

 Jackson v. McChesney, 247.
 Jackson v. Littell, 252, 253.
 Jackson v. Wood, 260.
 Jackson v. Harsen, 263.
 Jackson v. Delacroix, 265.
 Jackson v. Allen, 265.
 Jackson v. Bush, 281.
 Jackson v. Hagaman, 281.
 Jackson v. Jackson, 291.
 Jackson v. Honsel, 302.
 Jackson v. Robbins, 306.
 Jackson v. Bull, 309.
 Jackson v. Merrill, 310.
 Jackson v. Harris, 310.
 Jacobs v. Miller, 236.
 Jacoway v. Gault, 181.
 James v. James, 91.
 Jamieson v. Hay, 305.
 Jansen v. Cahill, 175.
 Jassey v. White, 307.
 Jecks v. Tonssing, 26.
 Jeffers v. Philo, 187.
 Jelks v. Barrett, 274.
 Jenkins v. Rosenberg, 247.
 Joest v. Williams, 141.
 Johns v. Fritchey, 141.
 Johnson v. Quarles, 238.
 Johnson v. Bantock, 194.
 Johnson v. Johnson, 18.
 Johnson v. Montgomery, 30, 31.
 Johnson v. McIntosh, 65, 66.
 Johnson v. Railroad Co., 96.
 Johnson v. Cornett, 259.
 Johnson v. United States, 105.
 Johnson v. Carpenter, 258.
 Johnson v. Hollensworth, 164.
 Johnson v. Stagg, 248, 254.
 Johnson v. Shaw, 183.
 Johnson v. Houston, 241.
 Johnson v. McGraw, 226.
 Jones v. Roberts, 190.
 Jones v. Bacon, 306.
 Jones v. Crane, 40.
 Jones v. Scott, 280.
 Jones v. Monroe, 153.

- Jones v. Scott, 270.
 Jones v. Franklyn, 163.
 Jones v. Brewer, 251.
 Jones v. Gurlie, 175.
 Jones v. Carter, 232.
 Joos v. Fey, 41.
 Jordan v. Bradshaw, 280.
 Joseph v. Bigelow, 192.
 Joslyn v. Parlin, 51.
 Kane v. O'Connors, 238.
 Kearney v. Macomb, 155.
 Kearney v. Vaughn, 196.
 Kearney v. Post, 268.
 Keates v. Hugo, 19.
 Keegan v. Geraghty, 78, 79.
 Keeler v. Keeler, 9.
 Keil v. Healy, 137.
 Keith v. Keith, 280.
 Keller v. Brickley, 84.
 Kelly v. Hendricks, 104.
 Kelly v. Transportation Co., 133.
 Kelly v. Calhoun, 181.
 Kelly v. Rosenstock, 182.
 Kennard v. Brough, 8.
 Kennedy v. Gaines, 288.
 Kennedy v. Kennedy, 302.
 Kenner v. American Contract Co., 50.
 Kent v. Atlantic De Laine Co., 161.
 Kent v. Welch, 162.
 Kent v. Cantrall, 221.
 Kenyon v. Quinn, 281.
 Kenzie v. Roleson, 297.
 Kerley v. Kerley, 32.
 Kerr v. Agard, 246.
 Kerr v. Dougherty, 91.
 Kerr v. Birnie, 185.
 Ketchum v. Railroad Co., 239.
 Kier v. Peterson, 4.
 Kille v. Eye, 185.
 Kimball v. Semple, 148.
 Kimball v. Kenosha, 151.
 Kimball v. Grey, 187.
 Kimpton v. Walker, 173, 216.
 Kincaid's Appeal, 22.
 King v. Whiton, 270.
 King v. Lawson, 35.
 King v. Rea, 159.
 King v. Gilson, 166.
 King v. Kerr, 167.
 Kinsley v. Ames, 256.
 Kinsman v. Loomis, 218.
 Kirk v. Burkholtz, 26, 156.
 Kirk v. Vanberg, 281.
 Kirkland v. Cox, 236.
 Kirkpatrick v. Chestnut, 317.
 Kister v. Reesor, 152.
 Kittredge v. Wood, 7.
 Kline v. McNamara, 246.
 Kline v. Beebe, 136.
 Kneeland v. Van Valkenburgh, 197.
 Knight v. Indiana Coal Co., 4, 5.
 Knight v. Smith, 181.
 Knight v. Waterman, 228.
 Knox v. Jones, 316.
 Koelle v. Knecht, 16.
 Korn v. Cutler, 302.
 Krant v. Crawford, 93.
 Krantz v. McKnight, 172.
 Kremer v. Railway Co., 21.
 Kruger v. Knob, 212.
 Kruse v. Wilson, 108, 195, 280.
 Kuhlman v. Hecht, 18.
 Kurtz v. Sponable, 257.
 Laberee v. Carleton, 47, 146.
 Lain v. Cook, 213.
 Laird v. Boyle, 267.
 Lake v. Gray, 209.
 Lamar v. Turner, 270.
 Lamar Co. v. Clements, 122.
 Lamb v. Kamm, 160.
 Lambert v. Smith, 193.
 Lametti v. Anderson, 267.
 Lammers v. Nissen, 118.
 Lampman v. Milks, 19.
 Land Co. v. Bonner, 138.
 Landets v. Brant, 281.
 Lane v. Debenham, 142.

- Lanfair v. Lanfair, 247.
 Langdeau v. Hanes, 83, 84, 89.
 Langdon v. Ingram's Guardian, 174.
 Langdon v. New York, 204.
 Langsdale v. Mills, 281.
 Lanier v. Booth, 18.
 Lansing v. Smith, 63.
 Lapham v. Norton, 9.
 Large v. Fisher, 213.
 Lassell v. Powell, 278.
 Lathrop v. Snell, 221.
 Laughlin v. Fream, 129.
 Lawe v. Hyde, 129.
 Lawrence v. Ball, 260.
 Lawrence v. Farley, 185.
 Learned v. Welton, 142.
 Leazure v. Hillegas, 183.
 Le Beau v. Armitage, 89.
 Leeming v. Sherratt, 305.
 Lefevre v. Lefevre, 314.
 Legget v. Doremus, 57.
 Leiter v. Sheppard, 26, 293.
 Lehnendorf v. Cope, 156.
 Leland v. Wilson, 280.
 Leland v. Gassett, 7.
 Leland v. Wilson, 270.
 Le Moyne v. Quimby, 235.
 Lenox v. Clark, 279.
 Leonard v. Diamond, 536.
 Leport v. Todd, 281.
 Le Roy v. Jamison, 201, 202, 203.
 Levy v. Levy, 76.
 Levy v. Griffiths, 307.
 Lewis v. Lyman, 7.
 Lewis v. Darling, 90, 318.
 Lewis v. Overby, 179.
 Lewis' Appeal, 103.
 Lide v. Hadley, 19.
 Life Ins. Co. v. Brown, 175.
 Life Ins. Co. v. White, 245.
 Lillard v. Ruckers, 157.
 Lindley v. Graff, 188.
 Lindsey v. Lindsey, 140.
 Lingen v. Lingen, 69.
 Linker v. Long, 226.
 Lippencot v. Allendar, 22.
 Livingston v. Tanner, 36.
 Locke v. Caldwell, 260.
 Locket v. James, 30.
 Lockwood v. Sturdevant, 286.
 Logansport v. Dunn, 122.
 Long v. Hewitt, 78.
 Long v. Waggoner, 148.
 Long v. Burnett, 213.
 Long v. Mostyn, 249.
 Loomis v. Riley, 280.
 Lorman v. Bensou, 11.
 Lorrillard v. Coster, 316.
 Loughridge v. Bowland, 190.
 Lovering v. Allen, 291.
 Lovington v. St. Clair, 93.
 Lowry v. Davis, 254.
 Loyless v. Blackshear, 157.
 Lucas v. Harris, 261.
 Luce v. Dunham, 295.
 Ludlow v. McCrea, 165.
 Luppie v. Winaus, 79.
 Lupton v. Lupton, 315, 317, 318.
 Lyle v. Palmer, 10.
 Lyon v. Kain, 69.
 Lyon v. Vannatta, 288.
 Lytle v. Beveridge, 295.
 McAbee v. Mazzuchelli, 205.
 McAllister v. Butterfield, 295.
 McAllister v. Plant, 256.
 McAllister v. McAllister, 314.
 McArthur v. Browder, 82.
 McCabe v. Hunter, 178.
 McCarley v. Supervisors, 179.
 McCleary v. Ellis, 174.
 McClellan v. McClellan, 236.
 McClure v. Burns, 258.
 McClurg v. Phillips, 251.
 McConnell v. Smith, 287, 299.
 McConville v. Howell, 76.
 McCormick v. Patchin, 208.
 McCormick v. McCormick, 28.
 McCormick v. Huse, 119.
 McCready v. Sexton, 211.

- McCullough v. Gilmore, 174.
 McDonald v. Bear River Co., 233.
 McDonald v. Life Ins. Co., 284.
 McDuff v. Beauchamp, 42.
 McGarrahan v. Mining Co., 201.
 McGary v. Hastings, 167, 202, 204.
 McGinty v. McGinty, 237.
 McGowan v. McGowan, 276.
 McGregor v. Brown, 29.
 McGuire v. Van Pelt, 256.
 McHany v. Schenk, 285.
 McIlvaine v. Harris, 6.
 McIntire v. Benson, 227.
 McIntire v. Storey, 87.
 McIver v. Walker, 205.
 McKenzie v. Steele, 104.
 McKenzie v. Shows, 6.
 McKinney v. Stewart, 77.
 McKinney v. Settles, 193.
 McLaughlin v. Ihmsen, 255.
 McLaughlin v. McLaughlin, 313.
 McLaurie v. Partlow, 237.
 McLean v. McBeane, 70.
 McLouth v. Hunt, 189.
 McMullen v. Lank, 143.
 McMurray v. McMurray, 137.
 McNeil v. Kendall, 269.
 McQuiddy v. Ware, 109.
 McQuie v. Peay, 251.
 McRea v. Bank, 10.
 Mack v. Witzler, 241, 259.
 Magee v. Mellon, 270.
 Magill v. Hinsdale, 232.
 Mahan v. O'Hara, 90.
 Malcolm v. Allen, 254.
 Mallony v. Horan, 30.
 Mallory v. Mallory, 238.
 Manderschild v. Dubuque, 121.
 Mandlebaum v. McDonnell, 174.
 Manley v. Gibson, 87, 123.
 Mann v. Betterly, 140.
 Mann v. Best, 218.
 Mansfield v. Hoagland, 279.
 Marigold v. Barlow, 190.
 Marsh v. Burt, 151.
 Marsh v. Chestnut, 209.
 Marsh v. Marsh, 277.
 Marshall v. Rose, 69.
 Marshall v. Roberts, 217.
 Marston v. Brashaw, 182.
 Martin v. Waddell, 65.
 Martin v. Zellerbach, 104.
 Martin v. Wyncoop, 276.
 Martin v. Beasley, 286.
 Marvin v. Smith, 236.
 Marvin v. Brewster, 18.
 Marvin v. Stone, 165, 166.
 Marx v. Hawthorn, 211.
 Masterson v. Cheek, 185.
 Mash v. Russell, 249.
 Mason v. Gray, 244.
 Mason v. Ainsworth, 358.
 Mason v. Osgood, 287.
 Mason v. Jones, 295.
 Mathews v. Skinner, 132.
 Matney v. Graham, 282.
 Mattox v. Hightshue, 40, 104.
 Mauck v. Mauck, 43.
 Maul v. Rider, 189.
 Maull v. Ashmead, 268.
 Maurior v. Coon, 282.
 May v. Fletcher, 77.
 May v. Le Claire, 218.
 Mayo v. Foley, 209.
 Mayor v. Railroad Co., 207.
 Meach v. Fowler, 191.
 Mead v. Jennings, 295.
 Meader v. Norton, 88.
 Meagher v. Thompson, 233.
 M. E. Church v. Hoboken, 86, 87.
 Meddock v. Williams, 181.
 Meeker v. Meeker, 145.
 Megerle v. Ashe, 84.
 Meigs' Appeal, 10.
 Merchant v. Woods, 261.
 Merrill v. Emery, 50, 307.
 Merrill v. Bickford, 318.
 Merrill v. Burbank, 146.
 Merritt v. Disney, 26.
 Merritt v. Harris, 51.

- Merritt v. Brantley, 309.
 Meskimen v. Day, 182.
 Metcalf v. Hart, 21.
 Metcalfe v. Brandon, 185.
 Meuley v. Zeigler, 179.
 Meyer v. Graeber, 254.
 Meyer v. McDougal, 287.
 Meyers v. Ladd, 150.
 Meyers v. Buchanan, 191.
 Meyers v. Anderson, 239.
 Mick v. Mick, 76.
 Miller v. Flournoy, 296, 297.
 Miller v. Plumb, 9.
 Miller v. Levi, 51.
 Miller v. Bledsoe, 70.
 Miller v. Williams, 74.
 Miller v. Parsons, 168.
 Miller v. Ware, 196.
 Miller v. Ewing, 218.
 Miller v. Aldrich, 253.
 Milliken v. Patterson, 211.
 Mines v. Mines, 190.
 Mining Co. v. Bonanza Co., 179.
 Minot v. Curtis, 314.
 Mirfitt v. Jessop, 299.
 Mitchell v. Burnham, 253.
 Mitchell v. Hazen, 166.
 Mitchell v. Warner, 169.
 Mitchell v. Bartlett, 183.
 Mitchell v. Haven, 270.
 Mitchell v. Williams, 208.
 Mix v. French, 70.
 Moderwell v. Millison, 43.
 Montag v. Linn, 182.
 Montague v. Dawes, 256.
 Montgomery v. Dorian, 135, 136.
 Montgomery v. Johnson, 150.
 Montgomery v. Reed, 169.
 Montgomery v. Dorion, 232.
 Moody v. Palmer, 151.
 Mooers v. White, 292.
 Mooney v. Cooledge, 153.
 Moore v. Fletcher, 8.
 Moore v. Cornell, 257.
 Moore v. Lyons, 33.
 Moore v. Miller, 265.
 Moore v. Chandler, 69.
 Moore v. Snow, 81.
 Moore v. Simmons, 157.
 Moore v. Giles, 185.
 Moore v. Robbins, 201.
 Moore v. Wade, 246.
 Moorecroft v. Dowding, 143.
 Moran v. Dillehay, 295.
 Moran v. Palmer, 203.
 Morgan v. Bouse, 278.
 Morgan v. Pope, 305.
 Morice v. Durham, 313.
 Morrill v. Noyes, 251.
 Morris v. Turnpike Road, 96.
 Morrison v. King, 19.
 Morrison v. Caldwell, 192.
 Morrow v. Scott, 74.
 Morrow v. Whitney, 89.
 Moshier v. Reding, 265.
 Moughon v. Masterson, 247.
 Mulford v. Peterson, 257.
 Mulford v. Beveridge, 287.
 Muller v. Strickler, 19.
 Mumford v. Whitney, 21.
 Murdock v. Ratchiff, 35.
 Murray v. Haverly, 40.
 Murray v. Blackledge, 131.
 Musgrove v. Bonser, 190, 191.
 Musick v. Barney, 190.
 Musser v. Hershey, 62.
 Negbauer v. Smith, 150.
 Nevins v. Gourley, 310.
 Newbold v. Boone, 297.
 Newcomb v. Presbrey, 172.
 Newell v. Newell, 147.
 Newsom v. Thompson, 157.
 Nichols v. Postlethwaite, 318.
 Nicholson v. Caress, 217.
 Nicoll v. Scott, 275.
 Nixon v. Cobleigh, 283.
 Norcross v. James, 168.
 Norman v. Wells, 163.
 Norris v. Milner, 51.

- Norris v. Thompson's Ex'rs, 313.
 North v. Norton, 255.
 Norton v. Kearney, 228.
 Nowlin v. Reynolds, 108.
 Nowry v. Providence, 86.

 O'Grady v. Barnishee, 211.
 O'Hear v. De Goesbriand, 13.
 Ochiltree v. McClurg, 146.
 Ochoa v. Miller, 281, 320.
 Odd Fellows' Bank v. Banton, 255.
 Odell v. Montross, 243, 244.
 Ogden v. Jennings, 15, 19.
 Ogden v. Waters, 181.
 Ogden v. Walker, 255.
 Okeson v. Patterson, 106.
 Okeson's Appeal, 317.
 Olds v. Cummings, 258.
 Oliver v. Piatt, 218.
 Oliver v. Berry, 140.
 Oliver v. Stone, 183.
 Olney v. Hall, 311.
 Olson v. Merrill, 93, 152.
 Orrick v. Boehm, 292, 319.
 Osgood v. Abbott, 48, 50, 52.
 Oswald v. Giffert, 267.
 Ottawa v. Spencer, 208.
 Overseers v. Sears, 135.
 Owen v. Field, 52.
 Owen v. Reed, 142, 271.
 Owens v. Miss. Soc., 314.
 Oxley v. Lane, 175, 297.

 Paige v. Sherman, 147.
 Paige v. Chapman, 258.
 Paige v. Foust, 303.
 Paine v. Woods, 12.
 Palmer v. Williams, 145.
 Palmer v. Ford, 171.
 Palmer v. Palmer, 185.
 Paris v. Mason, 96.
 Parish v. Whitney, 168.
 Parish v. Ward, 76.
 Park Commissioners v. Armstrong,
 97.
 Parker v. Kane, 187.
 Parker v. Foy, 146.
 Parker v. Parker, 297.
 Parker v. Hill, 184.
 Parks v. Hall, 243.
 Parks v. Parks, 295.
 Parrat v. Neligh, 283.
 Parret v. Shabhut, 190.
 Parsell v. Stryker, 266.
 Parsons v. Noggle, 244.
 Patton v. Hoge, 248.
 Paul v. Carver, 151.
 Payson v. Hadduck, 70.
 Peabody v. Minot, 42.
 Peabody v. Hewitt, 129.
 Peay v. Little Rock, 208.
 Peck v. Arehart, 195, 196.
 Peck v. Merrill, 226.
 Peckham v. Haddock, 194, 302.
 Penhallow v. Dwight, 6, 28.
 Pennock's Estate, 315.
 Pensonneau v. Bleakley, 232.
 People v. Herbel, 224.
 People v. Bradley, 208.
 People v. Merrill, 62.
 People v. Ferry Co., 63.
 People v. Circuit Judge, 144, 288.
 People v. Snyder, 186.
 People v. Marshall, 208.
 Peoria v. Darst, 195.
 Perkins v. Pitts, 260.
 Perley v. Chandler, 17.
 Peter v. Beverly, 319.
 Peters v. Spillman, 91.
 Peterson v. Laik, 137.
 Peterson v. Clark, 247.
 Pettingill v. Evans, 9.
 Peugh v. Davis, 242, 246.
 Phillips v. Moore, 136.
 Phillips v. Stevens, 266.
 Phillipsburgh v. Burch, 91.
 Pickering v. Langdon, 296, 297.
 Pierce v. Railroad Co., 251.
 Pierce v. Selleck, 19.
 Pierre v. Fernald, 19.

- Pierre Mutelle Case, 203.
 Pike v. Brown, 263.
 Pike v. Wassell, 99.
 Pillow v. Roberts, 178.
 Pillsbury v. Kingon, 227.
 Pingree v. Watkins, 217.
 Pitts v. Singleton, 274.
 Pitts v. Melser, 320.
 Playtor v. Cunningham, 268.
 Plumb v. Tubbs, 171.
 Plummer v. Plummer, 7.
 Pollard v. Hagan, 61, 62.
 Pollock v. Maison, 260.
 Pool v. Potter, 231.
 Porter v. Sullivan, 221.
 Porterfield v. Taliaferro, 70.
 Post v. Campau, 167.
 Post v. Pearsall, 20.
 Post v. Kearny, 267.
 Pote v. Mitchell, 166.
 Powell v. Sims, 19.
 Powell v. Smith, 53.
 Powell v. Powell, 138.
 Powell v. Rogers, 279.
 Power v. Cassidy, 313.
 Powers v. Jackson, 119.
 Presbyterian Church v. Adams, 13.
 Preston v. Morris Case Co., 257.
 Prettyman v. Wilkey, 216.
 Price v. Price, 14.
 Price v. Sisson, 38.
 Price v. Osborn, 138.
 Pringle v. Dunn, 181, 190, 270.
 Pritchard v. Brown, 238.
 Probasco v. Johnson, 248.
 Proctor v. Gilson, 7.
 Proffitt v. Henderson, 29.
 Prout v. Wiley, 137.
 Prouty v. Mather, 270.
 Provenchere's Appeal, 302.
 Pugh v. Holt, 243, 247.
 Pullan v. Railroad Co., 132.
 Pynchon v. Sterns, 195.
 Rackleff v. Norton, 182.
 Railroad v. Railroad, 276.
 Railroad v. Neighbors, 50.
 Railroad v. Brown, 84.
 Railroad v. Joliet, 87, 123.
 Railroad v. Burkett, 96.
 Railroad v. Ragsdale, 104.
 Railroad v. Ross, 108.
 Railroad v. Schurmeir, 118.
 Railroad v. Whitton, 131.
 Railroad v. Railroad, 207.
 Railroad v. Litchfield, 207.
 Railroad v. Washington Co., 208.
 Rally v. Guinn, 211.
 Ramires v. Kent, 136.
 Ramsdell v. Ramsdell, 306.
 Rand v. Sanger, 204.
 Rand v. Meier, 306.
 Randel v. Canal Co., 166.
 Rankin v. Miller, 288.
 Rawlings v. Bailey, 287.
 Rayburn v. Kuhl, 211.
 Raymond v. Halder, 109.
 Raynor v. Nugent, 23.
 Re Robbins, 151.
 Read v. Read, 136.
 Real v. Hollister, 169.
 Reasnor v. Markley, 250.
 Reavis v. Reavis, 187.
 Reckhow v. Schanck, 35.
 Redden v. Baker, 141.
 Redfield v. Dysart, 147.
 Reed v. Reed, 305, 316.
 Rees v. Chicago, 121.
 Reid v. Heasley, 282.
 Reinders v. Kappelmann, 78, 79.
 Rerick v. Kern, 21.
 Reynolds v. Scott, 243.
 Rice v. Railroad Co., 206.
 Rice v. Kelso, 251.
 Rice v. Monroe, 152.
 Rice v. Dewey, 254.
 Rich v. Doane, 243.
 Rich v. Zillsdorf, 6.
 Richards v. Crawford, 246.
 Richards v. Miller, 298.
 Richardson v. Clow, 147.
 Richardson v. Dorr, 166.

- Richmond v. Gray, 60.
Riddle v. Bush, 279.
Riddle v. Driver, 4.
Ridgeway v. Lamphear, 160.
Riggs v. Boyeau, 190, 191.
Riggin v. Love, 194.
Rigney v. Chicago, 95.
Rindskopf v. Loan Co., 167.
Ringhouse v. Keever, 77.
Ripley v. Harris, 255.
Rivers v. Thompson, 209.
Robbins v. Eaton, 137.
Roberts v. Roberts, 276.
Robertson v. Guerin, 270.
Robinson v. Legrand, 298.
Robinson v. Bates, 30.
Robinson v. Wiley, 33.
Robinson v. Perry, 34.
Robinson v. Mauldin, 55.
Robinson v. Payne, 194.
Rockwell v. Brown, 146.
Rogers v. Rogers, 187.
Rollin v. Pickett, 195.
Rose v. Taunton, 147.
Roseboom v. Van Vechten, 28.
Roseboom v. Mosher, 228.
Rosenthal v. Mayhugh, 161.
Ross v. Barclay, 275.
Ross v. Ross, 79.
Ross v. Sadgbeer, 146.
Ross v. Faust, 152.
Ross v. Worthington, 179.
Rountree v. Talbot, 297.
Rowe v. Pecker, 217.
Royce v. Guggenheim, 19.
Ruffner v. McConnell, 43, 130.
Ruigo v. Rotan, 84.
Runyan v. Messereau, 259.
Ruslin v. Shield, 185.
Russ v. Wingate, 181.
Russell v. Coffin, 180.
Russell v. Fabyan, 36.
Russell v. Mandell, 191.
Rutgers v. Hunter, 267.
Ruth v. Ford, 147.
Ruth v. King, 146.
Ruth v. Oberbruner, 236.
Rutherford v. Tracy, 120.
Ryan v. Doyle, 143.
Ryan v. Carr, 281.
Ryan v. Duncan, 286.
Ryan v. Carter, 84.
Ryder v. Flanders, 287.
Sackett v. Wheaton, 3.
Sackett v. Sackett, 29.
Samuels v. Shelton, 281.
Sanborn v. Robinson, 251, 252.
Sanders v. Eldridge, 149.
Sands v. Davis, 204.
Sands' Ale Brewing Co., Re, 253.
Sanford v. Bulkley, 181.
Sargent v. Howe, 239.
Saunders v. Schmaelzle, 149.
Saunders v. Haynes, 172, 193, 195.
Savage v. Hazard, 145.
Sawyer v. Peters, 187.
Saylor v. Plaine, 56.
Scanlan v. Wright, 136.
Scanlan v. Cobb, 138.
Scantlin v. Allison, 166.
Schafer v. Reilly, 258.
Scharfenburg v. Bishop, 181.
Schnee v. Schnee, 82.
Schneider v. Botsch, 110.
Schoenberger v. Hay, 165, 166.
Schott's Estate, 297.
Schumway v. Holbrook, 320.
Scott v. Kirkendall, 167.
Scott v. Rand, 239.
Scott v. Mann, 277.
Scruggs v. Blair, 43.
Seckler v. Delfs, 259.
Seigwald v. Seigwald, 306.
Sellers v. Sellers, 177.
Seylar v. Carson, 196.
Shackleton v. Sebree, 161.
Shannon v. Hall, 255.
Shattuck v. Hastings, 48.
Shaw v. Wiltshire, 246.

- Shay v. Norton, 243.
 Shear v. Stothart, 87.
 Shearer v. Weaver, 79.
 Sheldon v. Harding, 238.
 Sheldon v. Rice, 276.
 Shepardson v. Rowland, 40.
 Sherlock v. Winnetka, 208.
 Sherman v. Kane, 110.
 Sherrid v. Southwick, 249.
 Sherwood v. Sherwood, 296.
 Shields v. Miller, 281.
 Shirk v. Gravel Road Co., 279.
 Shively v. Parker, 61.
 Short v. Conlee, 183.
 Shortall v. Hinkley, 154.
 Shreve's Case, 301.
 Shumway v. Simmons, 106.
 Sibley v. Smith, 211.
 Siceloff v. Redman, 297.
 Sickie v. Haines, 11.
 Sillers v. Lesler, 251.
 Simmons v. Haven, 180.
 Simmons v. Fuller, 254.
 Simmons v. Simmons, 294.
 Simpson v. Neil, 62.
 Simpson v. Pearson, 103, 104.
 Sims v. Hammond, 258.
 Size v. Size, 33.
 Sloan v. Laurence Furnace Co., 152.
 Smith v. Hutchinson, 303.
 Smith v. McConnel, 286.
 Smith v. Granberry, 277.
 Smith v. Price, 6.
 Smith v. Bell, 306.
 Smith v. Commonwealth, 9.
 Smith v. Waggoner, 10.
 Smith v. Jewett, 28.
 Smith v. Estell, 33.
 Smith v. Littlefield, 37.
 Smith v. Brannan, 51.
 Smith v. McConnell, 74.
 Smith v. Calvin, 86.
 Smith v. Frankfield, 103.
 Smith v. Shuley, 133.
 Smith v. Zaner, 135.
 Smith v. Walser, 143.
 Smith v. Allen, 147.
 Smith v. Crawford, 149.
 Smith v. Block, 159.
 Smith v. Porter, 192.
 Smyth v. Taylor, 302.
 Snapp v. Pierce, 110.
 Snow v. Perkins, 7.
 Soens v. Racine, 208.
 Sohler v. Church, 172.
 Soule v. Barlow, 107.
 Southard v. Railroad Co., 52.
 Spackman v. Ott, 243.
 Sparrow v. Pond, 6.
 Spect v. Gregg, 51.
 Sperry v. Pound, 171.
 Splahn v. Gillespie, 279.
 Springer v. Brattle, 218.
 Spurlock v. Allen, 213.
 Stanclifts v. Norton, 254.
 State v. Meagher, 266.
 State v. Laverack, 96.
 State v. Fosdick, 131.
 State v. Canterbury, 152.
 State Bank v. Evans, 183.
 Steel v. Kurtz, 77.
 Steele v. Boone, 191.
 Steeple v. Dowing, 211.
 Steere v. Steere, 236, 237.
 Stein v. Sullivan, 257.
 Stephens v. Rhinehart, 185.
 Stephens v. Evans, 316.
 Stephens v. Holmes, 209.
 Stephens v. Reynolds, 266.
 Stephens' Heirs v. Swann, 136.
 Stephenson v. Thompson, 281.
 Sterling Hydraulic Co. v. Williams,
 168.
 Stevens v. Winship, 28.
 Stevens v. Hampton, 181.
 Stevens v. Railroad Co., 251.
 Stevenson v. Thompson, 238.
 Stewart v. Fitch, 63.
 Stewart v. Anderson, 165.
 Stewart v. Drake, 166.

- Stewart v. Barrows, 241, 259.
Stewart v. McSweeney, 154.
Stinchfield v. Little, 233.
Stines v. Dorman, 173.
Stockwell v. Campbell, 9.
Stoddard v. Chambers, 201.
Stoffell v. Schroeder, 218.
Stone v. Ellis, 51.
Stoner v. Hunsicker, 9.
Storer v. Freeman, 63.
Storrs Agricultural School v. Whitney, 156.
Stowe v. Steele, 270.
Stringer's Lessee v. Young, 81, 82, 201.
Strong v. Lehmer, 201.
Strother v. Lucas, 83, 206.
Strother v. Law, 256.
Stuart v. Allen, 286.
Stubbs v. Sargon, 313.
Sudbury v. Jones, 4.
Sumner v. Williams, 161, 270.
Sutherland v. Sutherland, 30.
Sutherland v. Goodnow, 267.
Sutton v. Cole, 55.
Sutton v. Schonwald, 284.
Swan v. Gaple, 259.
Swann v. Lindsey, 84, 206.
Swartz v. Leist, 258.
Sweat v. Corcoran, 201.
Sweet v. Mitchell, 243.
- Taggart v. Riskey, 193.
Taggart v. Murray, 297.
Talbot v. Hudson, 94.
Tallman v. Cooke, 185.
Tatum v. McClellan, 299.
Taylor v. Sutton, 48, 50.
Taylor v. Armstrong, 151.
Taylor v. Preston, 164, 172.
Taylor v. Dodd, 315, 317.
Taylor v. Gilpin, 285.
Taylor v. King, 261.
Taylor v. Morton, 178.
Teft v. Munson, 252.
- Teneick v. Flag, 188.
Terrell v. Andrew County, 189, 190, 191.
Territt v. Taylor, 206.
Terry v. Wiggins, 304, 305, 307.
Terwelliger v. Brown, 142.
Thacher v. Phinney, 179.
Thatcher v. St. Andrew's Church, 192.
Thatcher v. Condee, 239.
Thayer v. Wellington, 292.
Thomas v. Irrigation Co., 20.
Thomas v. Groesbeck, 185.
Thomas v. Wyatt, 83.
Thomas v. Babb, 108.
Thompson v. Miner, 19.
Thompson v. Prince, 84.
Thompson v. Lyman, 250.
Thompson v. Ware, 211.
Thompson v. Dearborn, 185.
Thompson v. Craighead, 283.
Thompson v. Morgan, 182.
Thompson v. Thompson, 191.
Thompson v. Pioche, 108.
Thompson v. Lovrein, 129.
Thompson v. Lambart, 133.
Thompson v. Boyd, 137.
Thompson v. Ludington, 311.
Thoms v. Thoms, 33.
Thorn v. Ingram, 285, 287.
Thornton v. Trammel, 173.
Thornton v. Irwin, 261.
Thorp v. Coal Co., 218.
Thrasher v. Ingram, 297.
Throckmorton v. Price, 190.
Thurman v. Cameron, 232.
Tibeau v. Tibeau, 187.
Tilley v. Bridges, 284.
Tillotson v. Millard, 33.
Timanus v. Dugan, 299.
Todd v. Railroad Co., 86.
Todd v. Philhour, 280.
Tolman v. Emerson, 212.
Tomlinson v. Swinney, 33.
Tompkins v. Fonda, 30.

- Torrey v. Deavitt, 257, 258, 262.
 Torrey v. Cook, 273.
 Tourtellot v. Phelps, 8.
 Towle v. Ayer, 223.
 Townsend v. Hubbard, 233.
 Townsend v. Corning, 233.
 Tracy v. Kilbourn, 309.
 Treadwell v. Reynolds, 186.
 Trim v. Marsh, 259.
 Tritt v. Roberts, 108.
 Troy v. Railroad Co., 97.
 Truman v. Love, 175.
 Trustees v. Lynch, 173.
 Trustees v. Beal, 249.
 Turner v. Ivie, 157.
 Turner v. Watkins, 242.
 Turner v. Field, 178.
 Turney v. Yeaman, 211.
 Tyler v. Reynolds, 78.
 Tyson v. Latrobe, 271.

 Underhill v. Railroad Co., 50.
 Union College v. Wheeler, 258.
 Union House v. Rowell, 13.
 Union Mill Co. v. Ferris, 82.
 United States v. Fox, 91.
 United States v. New Orleans, 208.
 United States v. Jones, 95.
 United States v. Hoar, 109.
 United States v. Schurz, 202.
 Uridas v. Morrell, 36.
 Ury v. Houston, 286, 287.
 Utz, Estate of, 301.

 Van Aken v. Gleason, 254.
 Van Antwerp, Re, 208.
 Van Courtlandt v. Kip, 292, 293.
 Van Deusen v. Sweet, 138.
 Van Honswyck v. Wiese, 291.
 Van Houten v. Ref. Dutch Church,
 13.
 Van Keuren v. McLoughlin, 226.
 Van Nostrand v. Moore, 296.
 Van Ransselaer v. Gallup, 268.
 Van Ransselaer v. Pennimar, 267.

 Van Rensselaer v. Hays, 265.
 Van Rensselaer v. Smith, 45.
 Van Reswick v. Goodhue, 251.
 Van Schaac v. Robbins, 196.
 Van Wickle v. Landry, 249.
 Vail v. Vail, 312.
 Vail v. Railroad Co., 48.
 Valle v. Fleming, 285.
 Vallejo v. Viera, 253.
 Vance v. Schuyler, 182.
 Vansyckle v. Richardson, 69, 70.
 Vason v. Ball, 241, 242.
 Vaughn v. Ely, 86.
 Vaughn v. Bunch, 293.
 Ventres v. Cobb, 142, 256, 271.
 Verges v. Gibony, 263.
 Vermont v. Gospel Society, 5.
 Vernon v. Vernon, 296, 303.
 Vernon v. Board of Police, 271.
 Videau v. Griffin, 175, 230.
 Viele v. Judson, 257.
 Vipond v. Hurlbut, 219.

 Waddington v. Hill, 164.
 Wade v. Deray, 150, 195.
 Wade v. Lindsey, 154.
 Wade v. Halligan, 268.
 Wadsworth v. Sharpstien, 141.
 Wainwright v. Tuckerman, 293.
 Wait v. Smith, 190.
 Wait v. Belding, 309.
 Wakefield v. Brown, 190.
 Walbridge v. Day, 69.
 Walker v. Dennison, 229, 230, 231.
 Walker v. Cockey, 253.
 Walker v. Craig, 274.
 Wall v. Wall, 290.
 Wallace v. Harmstad, 43.
 Wallace v. Wilson, 250.
 Waller v. Arnold, 255.
 Wallington v. Taylor, 318.
 Walter's Appeal, 315, 317.
 Walton v. Cody, 242, 246.
 Ward v. Mulford, 61, 62.
 Ward v. Amory, 307.

- Ware v. Richardson, 160.
 Ware v. Owens, 43.
 Warfield v. Brand, 274.
 Warnecke v. Lembea, 144.
 Warner v. Bennett, 171.
 Warner v. Bull, 154.
 Warner v. Crosby, 249.
 Warner v. Beach, 294.
 Warren v. Blake, 19.
 Warren v. Chambers, 93.
 Warren v. Lynch, 177, 178.
 Warren v. Levitt, 184.
 Warren v. Tobey, 187.
 Washburn v. Burnham, 190.
 Washington Ice Co. v. Shortall, 12.
 Wasson v. Conner, 182.
 Waterman v. Smith, 82.
 Waters v. Jones, 260.
 Waters v. Lilley, 20.
 Watkins v. Specht, 143.
 Watrous v. Allen, 49.
 Watson v. Hoy, 284.
 Watson v. Sherman, 175, 230.
 Watson v. Water Co., 132.
 Watson v. Blackwood, 295.
 Webb v. Peele, 146.
 Weckler v. Bauk, 132.
 Weeks v. Dowing, 191.
 Weeks v. Milwaukee, 208.
 Welch v. Dutton, 110.
 Welch v. Priest, 259.
 Welch v. Huse, 169.
 Wells v. Cowles, 14.
 Welsch v. Savings Bank, 297, 307, 308.
 Welsch v. Phillips, 244, 259.
 West v. Stewart, 7.
 Westlake v. Westlake, 138.
 Westmoreland Gas Co. v. Dewitt, 5.
 West Point Iron Co. v. Reymert, 153.
 Wetmore v. Parker, 314.
 Wetter v. Walker, 299.
 Whallon v. Kauffman, 165.
 Wheaton v. Andress, 302.
 Wheeler v. Clutterbuck, 68.
 Wheeler v. Beddell, 10.
 Wheeler v. Hartshorn, 295.
 Wheelock v. Thayer, 169.
 Whitaker v. Miller, 128, 148.
 White v. Cawson, 144, 288.
 White v. Whitney, 281.
 White v. Davis, 281.
 White v. Clover, 274.
 White v. Rittenmeyer, 243.
 White v. Carpenter, 272.
 White v. Luning, 150, 269.
 Whitehall v. Gottwal, 219.
 Whiting v. Butler, 281.
 Whitman v. Fisher, 274.
 Whitman v. Henneberry, 186.
 Whitney v. Allaire, 34.
 Whitney v. Railroad Co., 49, 173.
 Whitney v. French, 260.
 Wickle v. Calvin, 274.
 Wider v. East St. Louis, 208.
 Wiesner v. Zaun, 103.
 Wiggins Ferry Co. v. Railroad Co., 48, 168.
 Wilcox v. Jackson, 82.
 Wiley v. Sirdorus, 153.
 Wilkes v. Back, 232.
 Willamette v. Gordon, 320.
 Willard v. Cramer, 181.
 Williams v. Amory, 278.
 Williams v. Rhodes, 277.
 Williams v. Teachey, 259.
 Williams v. Love, 43.
 Williams v. Daken, 50.
 Williams v. Baker, 183.
 Williams v. Williams, 314.
 Williams v. Jackson, 262.
 Williamson v. Berry, 282, 285.
 Willot v. Sanford, 85.
 Wills v. Atkinson, 181.
 Wilson v. New Bedford, 11.
 Wilson v. Wilson, 50.
 Wilson v. Sexton, 87.
 Wilson v. Spring, 239.
 Wilson v. Reuter, 252.

- | | |
|----------------------------------|-------------------------------|
| Wilson v. Sweeney, 263. | Woodworth v. Payne, 48. |
| Wilson's Ex'rs v. Van Leer, 291. | Woods v. Hildebrand, 241. |
| Winans v. Cheny, 153. | Woolen Mill Co. v. Smith, 12. |
| Wing v. Railey, 171. | Worcester v. Eaton, 137. |
| Wing v. Cooper, 241, 242, 243. | Worrall v. Munn, 232. |
| Winkler v. Miller, 218. | Wray v. Wray, 140. |
| Winston v. Vaughn, 165. | Wright v. Day, 118. |
| Winter v. Crommelin, 82, 201. | Wright v. Dunn, 298. |
| Winthrop v. Fairbanks, 152. | Wylly v. Gazan, 196. |
| Wisenor v. Liudsay, 237. | Wyman v. Farrar, 153. |
| Witmore v. Laird, 181. | |
| Wits v. Harney, 238. | Yard v. Murry, 291. |
| Wolf v. Bollinger, 294. | Yarnall's Appeal, 301. |
| Wood v. Sampson, 90, 318. | Young v. Stevens, 139. |
| Wood v. Griffin, 316. | Young v. Clippinger, 219. |
| Woodbury v. Dorman, 250. | Youngs v. Youngs, 291. |
| Woodbury v. Luddy, 33. | Yount v. Howell, 82. |
| Woodbury v. Fisher, 184. | Youse v. Forman, 293. |
| Woodfin v. Anderson, 70. | |
| Woodman v. Pease, 10. | Zeigler v. Hughes, 251. |

PRINCIPLES

OF THE

LAW OF REAL PROPERTY.

CHAPTER I.

THE NATURE OF REAL PROPERTY.

Generally considered.—By the civil law tangible property of all kinds (*bona*)¹ was broadly classified as *movable* and *immovable*,² a natural division founded upon the specific character of the various objects that man appropriates for his own use. For many years the classification of the civilians remained unchanged, and land, with its increment, was known as immovable property.³ But when the Normans subdued Saxon England, and the conqueror parceled out among his followers the spoils of victory, a new name was introduced which has remained to this day. In return for the gifts bestowed by the king he exacted certain duties in the way of military service, and it was by this tenure his vassals held the royal bounty. But as cattle and other movables were too perishable to be subject to any feudal liabilities, they were

¹Mackenzie, Inst. 165; Maine, Anc. Law, 273; Coke, Litt. 118b. In continental jurisprudence *biens* included property of every description. There seem also to be distinctions between the comprehensive terms things (*res*) and rights (*jura*), when applied to ownership, that do not find exact counterparts in the common law.

²Taylor, Civ. Law, 475; Story, Conf. Laws, § 13, note 2; Wms. Real Prop. 2; Wash. Real Prop. 3. This division also finds expression in this country in the Code of Louisiana. Maine's Ancient Law may be read with profit by those who desire to pursue this subject.

³Taylor, Civ. Law, 475; Wms. Real Prop. 6.

bestowed as free gifts, and lands, castles, houses — immovable property — only, were held in this manner. Hence they were called *tenements*, or things held.¹ At first they were held only for the life of the tenant, but in time they were allowed to descend to heirs, when they were called, in addition, *hereditaments*,² and so the old name fell into disuse, and immovable property became known as *lands, tenements* and *hereditaments*. Movable property, in like manner, became known as *goods* and *chattels*, and in the old books is always so denominated.

It would seem, however, that with the increase of commerce and the adaptation of legal procedure to meet the growing wants of the people, a new classification was created based on the remedies provided for the deprivation of property. Thus, actions for the recovery of land were called *real* actions, because, it is said, the real or actual object of the suit could itself be secured; on the other hand, where goods and chattels had been taken, the remedy for their loss was against the *person* who had appropriated them, and so the two great classes of property began to acquire new names growing out of this marked difference in the nature of the legal remedies provided with respect to them.³ This new classification seems to have come into general use about the beginning of the eighteenth century, and since then goods and chattels have been designated as *personal property*, while lands, tenements and hereditaments have been known as *real property*.

Under the generic term "real property" is included not only land, but all rights and profits issuing from or annexed to the same that are of a permanent and immovable nature. These latter are sometimes classed as tenements by modern writers, and it has been said that "tenement" is a word of

¹ 2 Black. Com. 49; Wright's Tenures, 64. In this connection the student may with advantage consult Hallam's Middle Ages, vol. II; Hume's England, vol. II.

² Coke, Litt. 5b; 2 Black. Com. 17.

³ Wms. Real Prop. 6; Wash. Real Prop. 2.

greater extent than land, signifying everything that may be holden by a tenure, and that "hereditament" is still more comprehensive, including both lands and tenements, and, in addition, whatever may be inherited.¹ But these refinements are more fanciful than real, and it may be said that the old common-law names have practically no significance in this country at the present time.

Real property, for purposes of convenience, is divided into (1) *Corporeal hereditaments*, and (2) *Incorporeal hereditaments*; the former consisting wholly of substantial and permanent objects, the latter of rights and interests issuing therefrom or attached thereto.

I. CORPOREAL HEREDITAMENTS.

Generally considered.—Visible and tangible property was by the old law termed "corporeal," as having a body or substance capable of a manual transfer or delivery, or such as admits of an actual surrender of possession. In former times much stress was placed upon the seizin or legal possession of lands, and conveyances were made by a public and notorious delivery of such possession. This was the essential evidence of investiture of title in the new tenant and was called *livery of seizin*. Hence, corporeal hereditaments were said to be in *livery*, as distinguished from incorporeal rights, which, not being capable of actual delivery, were said to lie in *grant*.²

At present all property may be said to lie in grant, and delivery or surrender of possession is no longer requisite to perfect title.³ The phrase "corporeal," therefore, now possesses comparatively little significance, and is used mainly as a convenient expression to distinguish lands from rights annexed thereto.

¹See *Sackett v. Wheaton*, 17 Pick. (Mass.) 105; *Canfield v. Ford*, 28 Barb. (N. Y.) 336. Also 2 Black. Com. 17.

²2 Black. Com. 315; *Wms. Real Prop.* 10; *Coke*, Litt. 9a.

³4 Kent, Com. 84; *Bryan v. Bradley*, 16 Conn. 480; *Abbott v. Holway*, 72 Me. 298.

Land.—In its legal signification “land” comprehends the entire ground or soil of the earth, together with its produce or increment, as vegetation, waters, etc., and has an indefinite extent upwards as well as downwards.¹ It legally includes all houses, buildings and structures standing thereon,² and all minerals, fossils or gases beneath the surface.³ In its more restricted as well as popular meaning, it is the solid material of the earth, without reference to the character of the ingredients of which it is composed, whether soil, rock or other substance.⁴ As just stated, for many purposes every species of annexation or appurtenance will be considered under the head of land; yet, whenever a question has arisen upon such annexations or appurtenances, the restricted definition above given has always been adopted by the courts, and has even found expression in direct statutory enactments. In some instances state legislatures, with a laudable but misdirected desire to simplify the law and codify elementary principles, have gone so far as to declare that the term “land” includes not only lands, tenements and hereditaments, but “all rights thereto and interests therein.” This, however, is not the view usually taken by the courts, and, as a rule, these incidents are generally covered by the term “real property,” while the word “land” is restricted in its signification to the definitions first above given.

Minerals.—Coal, metals, and minerals of every description, while in place, are regarded as land;⁵ but, under a sys-

¹ 3 Kent, Com. 378; Coke, Litt. 4a; 1 Cruise, Dig. 58; 2 Black. Com. 18.

² *Sudbury v. Jones*, 8 Cush. (Mass.) 189; *Dooley v. Crist*, 25 Ill. 551; *Green v. Armstrong*, 1 Denio (N. Y.), 554.

³ 3 Kent, Com. 378; *Kier v. Peterson*, 41 Pa. St. 362; *Knight v. Indiana Coal Co.*, 47 Ind. 110; *Riddle v. Driver*, 12 Ala. 590.

⁴ In England it would seem that

this limited meaning is further restricted to arable land (see *Wms. Real. Prop.* 13); but the English signification, in this respect, has never obtained in the United States.

⁵ By the common law mines of the precious metals were excepted from this rule and held to belong to the crown. In this country there is no substantial difference between a gold mine or a coal

tem peculiar to the United States, or, with greater strictness, to certain of the states, mineral deposits and seams beneath the surface may be sold and conveyed by deed entirely distinct from the surface rights. Such a procedure was impossible under the old English system of conveyancing, at least so far as unopened mines were concerned, because livery of seizin was an inseparable incident of every conveyance and could not be had of a separate interest in land beneath the surface. Hence, notwithstanding such interests were not, in the proper acceptance of the term, rights issuing out of the land, but the very substance itself, they were usually regarded as incorporeal hereditaments. But registration having taken the place of the ancient livery, there is nothing incongruous in considering a grant of the substratum of land as much as a conveyance of the surface itself.¹

Oils and gases.—Earth oils and volatile gases occupy much the same position in the law of real property as water, and, like water, are not the subjects of property except while in actual occupancy. They are usually classed as minerals, possessing in some degree a kindred nature, and, so long as they remain in place, are fully included in the comprehensive term “land.”² Unlike other minerals, however, they have the power as well as the tendency to escape without the volition of the owner, and in this respect they possess substantially the same attributes as water. Hence, ownership therein is properly only an incorporeal interest, and a grant of oils or gases is practically no more than a mere

mine, so far as the question of ownership is concerned. Some of the states, notably New York and Pennsylvania, seem to have made assertions of sovereign rights in mines of gold and silver, in virtue of the English rule, but generally neither state nor federal governments have claimed any rights other than those which follow the

ownership of the soil as an incident. See *Boggs v. Merced Co.*, 14 Cal. 375; *Gore v. McBrayer*, 18 Cal. 588.

¹*Caldwell v. Fulton*, 31 Pa. St. 475; *Knight v. Indiana Coal Co.*, 47 Ind. 110.

²*Westmoreland Gas Co. v. De Witt*, 130 Pa. St. 235.

license to sink shafts and extract same, and is governed by the general rules which apply to licenses.¹

Growing crops.—Although growing crops are usually regarded as personal property, yet under some circumstances they are held to be real estate. Unless reserved, they will pass under a deed to the purchaser of the land as being annexed to and forming a part of the freehold.² When the vendor has made a sale of all his right, title, interest and estate in the land, it is but fair to suppose that the growing crops entered into the view of the purchaser, and formed a part of the consideration for the purchase-price which he paid for the land; and this construction is the one generally adopted by the courts.

A distinction is made, however, between growing crops and ripened crops, and it has been held that the rule above stated only applies when the crops are immature and have not ceased to draw nutriment from the soil at the time of sale. The ripened crop is said to possess the character of personalty, and the fact that it rests upon the land unsevered is of no consequence. In such event the crop is no longer part of the realty.³

Trees and herbage.—As we have seen, the term "land" embraces not only the soil but its natural produce growing upon it and affixed to it. Therefore trees and herbage, in place, are integral parts of the realty⁴ and pass with a grant of the land.⁵ So, too, the fruits of trees, perennial bushes and grasses growing from perennial roots, are, while unsevered from the soil, considered as belonging to it and a part of the realty.⁶ Trees and shrubbery grown upon premises leased

¹Dark v. Johnston, 55 Pa. St. 164.

⁴Clafin v. Carpenter, 4 Met. (Mass.) 580; Rich v. Zielsdorf, 22

²Bear v. Ritzer, 16 Pa. St. 178;

Wis. 544.

McIlvaine v. Harris, 20 Mo. 457;

⁵Smith v. Price, 39 Ill. 28; Hutchins v. King, 1 Wall. (U. S.) 59.

Bradner v. Faulkner, 34 N. Y. 349.

³Garanflo v. Cooley, 33 Kan. 137;

⁶Sparrow v. Pond, 49 Minn. 412;

Penhallow v. Dwight, 7 Mass. 34;

McKenzie v. Shows, 70 Miss. 388.

Howe v. Batchelder, 49 N. H. 208.

for nursery purposes will generally be held to be personal property as between landlord and tenant, but between parties standing in other relations will pass with the land unless specially reserved.

Manure.—In cases of sales of agricultural lands, it is a generally accepted rule that manure lying upon the property is to be regarded as real estate, and same will pass to the vendee as an incident of the land unless specially reserved in the deed.¹ In a few instances a distinction has been made between manure lying in heaps in a barnyard and where it is placed or spread upon the land, the former being regarded as personalty; but this distinction, which originally was made in favor of tenants, is not generally recognized.² The rule as just stated does not apply to manure made in livery-stables, or in buildings unconnected with agricultural property, and out of the course of husbandry;³ nor even in the business of stock-raising, the stock not being fed upon the products of the land.⁴ In such cases the manure is not considered an incident to the land, and does not pass by a conveyance of it.⁵

Houses and buildings.—Within the term “land” are included all houses and buildings standing thereon, which pass by a conveyance of the land without special mention;⁶ and in all contracts for the sale and conveyance of lands, the improvements resting upon or affixed to them at the time are

¹ Kittredge v. Woods, 3 N. H. 503; Haslem v. Lockwood, 37 Conn. 500; Lewis v. Lyman, 22 Pick. (Mass.) 437.

² The reason for the rule, it is said, is that it is for the benefit of agriculture that manure, which is usually produced from the droppings of cattle or swine fed upon the products of the farm, and composted with earth or vegetable matter taken from the soil, and the frequent application of which

to the ground is so essential to its successful cultivation, should be retained for use upon the land. Such undoubtedly is the general usage. Fay v. Muzzey, 13 Gray (Mass.), 53.

³ Proctor v. Gilson, 49 N. H. 62.

⁴ Snow v. Perkins, 60 N. H. 493.

⁵ Plummer v. Plummer, 30 N. H. 558.

⁶ West v. Stewart, 7 Pa. St. 122; Leland v. Gassett, 17 Vt. 403.

considered as part and parcel of the purchase. On the other hand, land which is essential to the use of a building will pass by a conveyance of the building if it appears that such was the intention of the parties.¹

But houses and buildings are real estate only while in place. A severance changes the character of the property from real to personal, irrespective of the means by which it may be accomplished; and, so far as the legal effect is concerned, it matters not whether the severance was by act of God or act of man.²

Fixtures.—A fixture has been defined as a personal chattel annexed to real estate, which may be severed and removed by the party who affixed it, or by his personal representatives, against the will of the owner of the freehold.³ Yet the term “fixture” is a most uncertain title, and in many cases — possibly a majority — is used in exactly a contrary sense to the definition just given, being employed to indicate a chattel annexed to realty so as to become a part of it.

It is a rule of the common law that whatever is accessory to real estate is a part of it, and passes by alienation. The necessities of trade have caused a modification of this rule so far as it may affect the relation of landlord and tenant, and courts recognize and enforce the right of removal by tenants of chattels annexed to the freehold for the purposes of manufacture, agriculture, trade, or domestic convenience. But as between vendor and vendee, and executor and heir, the rule is still applicable, except so far as it may have been modified by statutory regulation; and where the question is not affected by the terms of a contract of sale, appurtenances and chattels attached to lands, and contributing to their value and enjoyment, pass by a grant of the freehold and cannot be severed by any person other than the owner.⁴

¹Gibson v. Brockway, 8 N. H. 465; Moore v. Fletcher, 16 Me. 60.

³Bouv. Law Dict. 593.

²Buckout v. Swift, 37 Cal. 433.

⁴Tourtellot v. Phelps, 4 Gray (Mass.), 378; Kennard v. Brough,

Just what shall be regarded as a fixture, and what a chattel sufficient to escape the operation of the foregoing rule, is not always an easy matter to decide. Many things pass by a deed of lands, being put there by a vendor, which, if placed by a tenant, might have been removed; and they will pass to a vendee, although attached for the purposes of trade, manufacture, or even ornament or domestic use. Thus, utensils and machinery appertaining to a building for manufacturing purposes; gas-pipes, fittings and other apparatus designed for the purpose of illumination; water-pipes and conduits; ranges, boilers and tanks attached in a permanent manner.¹ Stoves and hot-air furnaces or other appliances for heating, when put in as a permanent annexation, have been held to pass,² though on this point the authorities are not agreed. Window and door screens, storm doors, or other adjuncts made and fitted to a house, usually go with it,³ and generally anything that the vendor has annexed to a building for the more convenient use and improvement of the premises passes by his deed unless specifically reserved.⁴

The rule, therefore, would seem to be that, where the annexation is permanent in its character and essential to the purpose for which the property is used or occupied, it should be regarded as realty and pass with a grant of the freehold; and this, notwithstanding the connection between them, may be such that it may be severed without physical or lasting injury to either.⁵

The mode of annexation, while of controlling efficacy as between landlord and tenant, and sometimes between executor and heir, is of comparatively small moment as between

64 Ind. 24; *Lapham v. Norton*, 71 Me. 83; *Stoner v. Hunsicker*, 47 Pa. St. 514. 665; *Goddard v. Chase*, 7 Mass. 432; *Hays v. Doane*, 11 N. J. Eq. 96; *Smith v. Commonwealth*, 14 Bush

¹ *Miller v. Plumb*, 6 Cow. (N. Y.) 665; *Hays v. Doane*, 11 N. J. Eq. 96; *Fratt v. Whittier*, 58 Cal. 126. (Ky.), 31; *Stockwell v. Campbell*, 39 Conn. 362.

² *Goddard v. Chase*, 7 Mass. 432. ⁵ *Green v. Phillips*, 26 Gratt. (Va.) 752; *Keeler v. Keeler*, 31 N. J.

³ *Pettengill v. Evans*, 5 N. H. 54. Eq. 191; *Capen v. Peckham*, 35

⁴ *Miller v. Plumb*, 6 Cow. (N. Y.) Conn. 94.

vendor and vendee — the purposes of the annexation and the intent with which it was made being, in most cases, the important consideration.¹ Physical annexation is not indispensable provided the article is of an accessory character, and in some way in actual or constructive union with the principal subject, and not merely brought upon it. It is true the mode of annexation, in the absence of other proof of intent, may become controlling, as where it is in itself so inseparable and permanent as to render the article necessarily a part of the realty;² and even in case of a less thorough method, the manner of attachment may still afford convincing evidence that the intention was to make the article a permanent accession.³ Still, there is no unvarying test; and neither the mode of annexation nor the manner of use can ever be said to be entirely conclusive, the express or implied understanding of the parties being usually the pivot on which the question turns.⁴

It will, of course, be understood that parties may themselves, by express agreement, fix upon chattels annexed to realty whatever character they may see fit.⁵ Hence, property which the law regards as permanent fixtures may be by them considered as personal chattels, and that which, in contemplation of law, is regarded only as personalty they may treat as a fixture, and whatever may be their agreement courts will enforce it.⁶

Water.—It has been said to be vitally essential to the public peace and to individual security that there should be distinct and acknowledged legal owners for both the land and water of the country,⁷ and that property in water, and

¹ *McRea v. Bank*, 66 N. Y. 489; *v. Wentworth*, 28 Vt. 436; *Bainway Wheeler v. Bedell*, 40 Mich. 693; *v. Cobb*, 99 Mass. 458.

Meigs' Appeal, 62 Pa. St. 33; *Woodman v. Pease*, 17 N. H. 284. ⁵ *Fratt v. Whittier*, 58 Cal. 126; *Bartholomew v. Hamilton*, 105 Mass. 239.

² *Lyle v. Palmer*, 42 Mich. 314.

³ *Wheeler v. Bedell*, 40 Mich. 693.

⁴ *McRea v. Bank*, 66 N. Y. 489; *Hill*

⁶ *Smith v. Waggoner*, 50 Wis. 155.

Meigs' Appeal, 62 Pa. St. 33; *Gavitt v. Chambers*, 3 Ohio, 497.

in the use and enjoyment of it, is as sacred as in the soil over which it flows.¹ But water, from its peculiar nature, is not susceptible of the same use or possession as land, and property therein is at best a mere usufructuary right; and in every case, where of sufficient volume and depth, such right is subservient to the public right of navigation. If the water is not navigable it is, for all practicable purposes, the property of the owner of the subjacent soil; and in any event he is entitled to every beneficial use of the same which can be exercised with a due regard for the common easement.²

In the case of running water the riparian proprietor has a right to the use and enjoyment of it and the benefits to be derived from it as it flows through his own land; but, as this right is common to all through whose land it flows, it follows that no one can wholly destroy or divert it so as to prevent it from passing to the property below, or wholly obstruct it so as throw it back upon the land of the one above.³

In the case of standing water, as well as water percolating through the soil, while absolute ownership, in the strict sense of the term, is of course impracticable, yet the right of property, so far as the element is capable of beneficial use, is complete in the owner of the freehold, free from any usufructuary rights in others.⁴

Ice.—While ice is only water in a congealed state, it nevertheless partakes largely of the general characteristics of land, and is capable of an ownership not unlike that by which land is held. It is generally regarded as being connected with, and in the nature of, an accession to the land, being an increment arising from formations over it, and belonging to the land properly, as being included in it in its indefinite

¹ Lorman v. Benson, 8 Mich. 32;
Wadsworth v. Tillotson, 15 Conn.
366.

² Cary v. Daniels, 5 Met. (Mass.)
236.

³ Hill v. Newman, 5 Cal. 445; Van
Sickle v. Haines, 7 Nev. 249.

⁴ Hanson v. McCue, 42 Cal. 303;
Wilson v. New Bedford, 108 Mass.
261.

extent upwards;¹ and such, no doubt, must be the character accorded to it so long as it remains in place upon the soil.² In this condition it would certainly pass as a portion of the realty upon a sale of the estate to which it is attached.

Ice has not been much dealt with as property, however, until very modern times, and for this reason no settled body of legal rules has been agreed upon concerning it. So far as the principles of the common law go, they have usually, if not universally, treated nothing movable as realty unless either permanently or organically connected with the land. In its essentials ice is only the product of water which has become fixed by freezing; in this condition it draws nothing from the land, and if removed will lose its identity by melting. It has no organic connection with the land, and if severed can only be joined to it again by the alternate process of melting and freezing. In many cases it is liable to disruption and consequent loss to the freeholder by being swept away, while its ephemeral character renders it incapable of any permanent beneficial use as a part of the soil, and it attains its greatest value only when removed from its original position. Regarding it, therefore, in this light, and with reference to its uses in fact as a commercial commodity, while it may for many purposes be justly regarded as part of the realty when resting in place, yet a sale of ice already formed, as a distinct and specific article, may properly be regarded as a sale of personalty, whether in or out of the water.³

Church pews.—Inclosed seats in churches do not appear to have been known, according to the modern idea, until long after the Reformation, and were not in general use until about the middle of the seventeenth century. Prior to that time no separate seats were allowed, except in a few instances, and the body of the church was common to all.

¹ Washington Ice Co. v. Shortall, Conn. 462; Paine v. Woods, 108 Mass. 173.

² Hydraulic Co. v. Butler, 91 Ind. 134; Woolen Mill Co. v. Smith, 34 Mich. 318.

³ Higgins v. Kusterer, 41 Mich.

When sittings were first introduced they were usually sold to persons occupying them, and in this manner the purchaser became seized of a peculiar kind of an estate therein, and the questions which have been raised in controversies relative thereto have been productive of some very remarkable decisions. According to the English idea the interest of a pew-owner is of an incorporeal nature only — an easement, as it were — and consists mainly of the right to enter and occupy during the celebration of divine service. In the United States, in the absence of a statute declaring their status, they have been considered as partaking of the nature of realty;¹ and the owner has been held to have an exclusive right of possession and enjoyment, for the purposes of public worship, not as an easement, but by virtue of an individual right of property;² in other words, although the right thus acquired is a limited and qualified interest, it is, notwithstanding, an interest in real estate. This right, however, even though it be regarded as an interest in realty, does not extend to the fee, and for all practical purposes is usufructuary only. Though not an easement in name, it is so in reality.³

As a matter of fact, however, the old system of pew conveyances has almost become obsolete. Deeds are no longer given in the majority of churches, and the sittings are let by what amounts to nothing more than a mere license.

Corporation stock.—It would seem to be the law in England that shares in the property or stock of a corporation may, under certain circumstances, be regarded as real property. Thus, where the corporate powers are to be exercised solely in respect to land, as where original authority is given by charter to improve a river, construct a canal, erect water-

¹ O'Hear v. De Goesbriand, 33 Vt. 593; Shoier v. Trinity Church, 109 Mass. 1; Brumfield v. Carson, 33 Ind. 94.

² Presbyterian Church v. Adams, 21 N. J. L. 325; Church v. Wells, 24

Pa. St. 249; Cox v. Baker, 17 Mass. 438.

³ Union House v. Rowell, 66 Me. 245; Van Houten v. Ref. Dutch Church, 17 N. J. Eq. 126.

works, etc., and the property or interest in the land, though it be an incorporeal hereditament, is vested inalienably in the corporators themselves, the shares are deemed real estate.

But this doctrine, while it may seem to have received a faint assent in some of the earlier American cases,¹ is not, and never has been, generally recognized in the United States.

II. INCORPOREAL HEREDITAMENTS.

Generally considered.—While the term “incorporeal” is still employed to designate certain kinds of real property of an invisible or intangible nature, yet its original and early significance has wholly disappeared. The test or distinction between corporeal and incorporeal property, as these terms were used at common law, lay in the fact of susceptibility of actual delivery, and such things as were incapable of same, because of their intangible nature, were denominated incorporeal. Being incapable of an actual delivery, they could be transferred or conveyed only by *grant* or deed; hence incorporeal property was said to lie in *grant*, while corporeal property, or such as admitted of some manual and visible act of delivery, was said to lie in *livery*.²

Incorporeal property, in the sense in which that term is used in the English law, finds but few examples in the United States, and, although the term is in common use, it is usually confined to that class of property rights generally known as *easements*, *licenses* and *franchises*, or to those interests which pass under a conveyance of land by the generic name *appurtenances*.

Under the English law the term included advowsons and rents, which were held to be of a real nature; offices exercisable within certain places, though not annexed to land, were said to savor of realty; while dignities or titles of

¹ See *Wells v. Cowles*, 2 Conn. ² *Coke*, Litt. 9a; 1 *Prest. Est.* 13; 567; *Price v. Price*, 6 Dana (Ky.), *Wms. Real Prop.* 239. 107.

honor, having originally been annexed to land, were also considered as real property.¹ None of the foregoing can properly be said to have ever been recognized in this country.

In some particulars incorporeal hereditaments resemble estates, and by some writers have been confounded with same. They are, however, distinct species of property in which estates may be created in much the same manner as in corporeal property, and the fact that they are annexed to or issue out of land does not affect their character in this respect.

Appurtenances.—Land is usually conveyed together with the hereditaments and appurtenances thereunto belonging. An *appurtenance* may be described in general terms as something belonging to another thing as principal, and which passes as an incident to such principal thing.² Thus, in a grant of lands everything passes which is necessary to the full enjoyment thereof, and which is in use as an incident or appurtenant thereto. The term is made to cover a wide diversity of subjects, and is often a source of contention for this reason. But under appurtenances nothing passes except such incorporeal easements, rights or privileges as are strictly necessary and essential to the proper use of the estate to which they are annexed.³

It is an invariable rule, however, that a thing corporeal cannot be made appurtenant to a thing corporeal, and hence land is never appurtenant to land;⁴ nor will the term carry with it any rights or interests in the property of the grantor on other lands which he owns;⁵ neither can it be made to

¹Incorporeal hereditaments at common law comprised advowson, tithes, common, ways, offices, dignities, franchises, rents. It would seem also that the elementary writers were wont to include as incorporeal hereditaments certain

sions and remainders, but this is confounding a *right* with a *thing*.

²1 Bouv. Law Dict. 136.

³Ogden v. Jennings, 62 N. Y. 526; Cave v. Crafts, 53 Cal. 135.

⁴Grant v. Chase, 17 Mass. 443; Barrett v. Bell, 82 Mo. 110.

⁵Frey v. Drahos, 6 Neb. 1; Ogden v. Jennings, 60 N. Y. 526.

classes of estates, notably rever-

include anything not situate on the land described in the conveyance, although used in connection therewith.¹ There are apparent exceptions to these rules in some of the earlier cases in the construction of wills, where the word "appurtenances" has been construed in such a manner as to take it out of the strict legal and technical definition above given,² but this enlarged sense has never been applied to grants by deed.

Under the heads of appurtenances are classed rights of way, rights of flowage, race-ways, water-powers, and generally any other incident in the nature of an easement that is requisite to a fair enjoyment of the grant, or which has been necessarily and incidentally used in connection with the subject of the grant, and which is of a different but congruous nature.

Easements.—An incorporeal right existing in favor of and imposed upon corporeal property is called an *easement*. The converse of an easement is denominated a *servitude*. The land to which the privilege is attached is called the *dominant estate*, and that against which it exists, the *servient estate*. As these rights are not usually personal, and do not change with the persons who may own the respective estates, it is very common to personify the estates themselves as owning or enjoying the easements.³

Easements are classed as *appurtenant* or *in gross*. When in gross they are purely personal to the holder and cannot be assigned, nor will they pass by descent. When appurtenant, they are attached to land as an incident and pass with it, whether the land be conveyed for years, for life or in fee. In either case they cannot be separated from or transferred independent of the land to which they inhere.⁴ An appurtenant easement attaches to every part of the land

¹ Frey v. Drahos, 6 Neb. 1.

² See Jackson v. White, 8 Johns. (N. Y.) 59.

³ Consult 3 Kent, Com. 435; Wash. Easements, 5; Walk. Am. Law, 265.

This species of right is very ancient and was known under the civil law as a *predial* servitude. See Sanders' Justinian.

⁴ Koelle v. Knecht, 99 Ill. 496.

to which it is incident, no matter into how many parts it may be subdivided or however small, and is to be enjoyed by all of the owners, no matter how many they may be.¹

With respect to the servient estate easements are further divided into *affirmative*, or such as permit something to be done on such estate, and *negative*, or such as restrict the owner of the servient estate from doing that which he otherwise might. These may be illustrated in the former case by rights of way or flowage, in the latter by inhibiting the erection of buildings which would tend to impair the enjoyment of light and air by the dominant estate.²

While easements may be created for an infinite variety of purposes they are usually such as relate to rights or privileges of ingress or egress. The most common form of easement is a right of way. This, in every case, is but a mere right to use the surface of the soil for the purpose of passing and repassing and the incidental right of properly fitting the surface for that use, but the owner of the soil has all the rights and benefits of ownership consistent with such easement.³ The right to overflow the lands of the servient estate to the extent necessary to the profitable enjoyment of the dominant estate is another familiar form of easement in connection with water-mills or hydraulic works of any kind. The right of lateral support of buildings; of receiving air, light or heat from or over other land; of receiving and discharging water, etc., are all instances of easements.

There is a certain class of privileges which is sometimes confounded with easements, but which, as a matter of law and fact, has nothing in common with them except the appearance of benefits on the one hand and burdens on the other. This is illustrated in the right which every owner of land, through which a natural stream of water flows, has to have such stream flow from his land unobstructed in its

¹ Garrison v. Rudd, 19 Ill. 558.

³ Perley v. Chandler, 6 Mass. 454.

² Wash. Real Prop. 301; Tud. Lead. Cas. 107.

natural channel, unless such right has been curtailed in some legal manner. This is said to be a natural right. It is true such rights have some resemblance to easements, but they are not in fact real easements; for, as every easement is supposed to have its origin in grant, or prescription which presupposes a grant, it would be absurd to suppose that the owner of land at the head of a stream has an easement so acquired for its flow over all the lands of lower riparian owners for many miles to its mouth. The term "natural easement" is indeed often made use of by courts, especially in the case of flowing water, but the preponderating opinion seems to maintain the principle that a right of this character is a natural right—an incident of property in the land, not an appurtenance to it.¹

An easement is technically created only by grant or confirmation; but such grant may be implied when the existence of the easement is necessary to the enjoyment of that which is expressly granted or reserved, upon the principle that when one grants anything to another he thereby grants to him the means of enjoying it, whether expressed or not;² and in pursuance of this principle the general rule is, that in every deed of a part of the grantor's land, without express provision on the subject, there is an implied grant or reservation of all easements of necessity for the enjoyment of the part conveyed or the part retained.³

An easement may also be established by prescriptive user from which a grant is inferred. Where an easement is established by prescription or grant presumed from user, it is limited to the actual user.⁴ And so in like manner an easement of necessity arising by implication cannot be extended

¹Johnson v. Johnson, 2 Met. Kuhlman v. Hecht, 77 Ill. 570; (Mass.) 234; Scriver v. Smith, 100 Collins v. Prentice, 15 Conn. 39.
N. Y. 471. Consult Wash. Easements, 276; Ang. Water-courses, § 90.

³Dillman v. Hoffman, 38 Wis. 559; Marvin v. Brewster, etc. Co., 55 N. Y. 553.

²Lanier v. Booth, 50 Miss. 410;

⁴Bradley's Fish Co. v. Dudley, 37 Conn. 136.

beyond what the existing necessities of the case require,¹ and continues only so long as the necessity itself exists.²

Easements may be extinguished by *release*, by *merger* or by *abandonment*. Where the owner of the dominant estate acquires the fee of the servient estate, the easement becomes merged in the unity of possession and title thus occasioned,³ although it may be revived in the event of the severance of the tenements where the use is apparent and continuous and necessary to the reasonable enjoyment of the severed part.⁴

Mere non-user, of itself, will not materially affect the right to an easement, but if continued for a long period of time, say twenty years, under such circumstances as show an intention of abandonment, it may be sufficient to extinguish such easement; and even an abandonment for a shorter period, showing an intention to release or surrender the right, and which is acted upon by the owner of the servient tenement so that it would work harm to him if the easement were thereafter asserted, would operate to extinguish same.⁵ It would seem, however, that the question of abandonment is always one of intention, depending largely upon the facts of each particular case; and while time is one of the elements from which intention may be inferred, yet the question seems to depend less upon the duration of time than the acts which accompany the fact of disuse.⁶

Profits a prendre.—Rights exercised by one person in the soil of another, accompanied with a participation in the

¹ *Lide v. Hadley*, 36 Ala. 627; *Brakely v. Sharp*, 10 N. J. Eq. 206; *Pierce v. Selleck*, 18 Conn. 321. *Thompson v. Miner*, 30 Iowa, 386.

² *Ogden v. Jennings*, 62 N. Y. 532; *Warren v. Blake*, 54 Me. 276. ³ See *Keates v. Hugo*, 115 Mass. 204; *Muller v. Strickler*, 19 Ohio St. 135; *Pierre v. Fernald*, 26 Me. 436. Compare *Powell v. Sims*, 5 W. Va. 1; *Royce v. Guggenheim*, 106 Mass. 201.

³ *Tyler v. Hammond*, 11 Pick. (Mass.) 193; *Atwater v. Bodfish*, 11 Gray (Mass.), 150.

⁴ *Morrison v. King*, 62 Ill. 30; *Lampman v. Milks*, 21 N. Y. 505; ⁵ *Dyer v. Sanford*, 9 Met. (Mass.) 395.

profits of the land, are termed *profits à prendre*. The strict and technical definition of an easement excludes a right to the products or proceeds of land, it being a mere right of convenience without profit; yet it is generally admitted that a right of profits is in the nature of an easement, and, although capable of being transferred in gross, may also be attached to land as an appurtenance, and pass as such.¹ The question does not seem to be altogether well settled, however, as a right of this nature is, on general principles, an interest in the land itself, and hence not properly an easement. It is true it is a privilege, as is also an easement, but the latter is a privilege without profit, and is merely accessory to rights of property in land, while the former is the reverse.

A profit *à prendre* always contemplates a participation of some kind in the profits of the land. It includes many things that ordinarily pass under the head of license, and, as we have seen, the distinction between it and an easement is not always palpable. Thus, a right of pasture; of mining; a privilege to fish, hunt, etc., are all profits *à prendre*, and when not granted in favor of some dominant tenement cannot be said to constitute an easement in the proper acceptance of that term, but rather an incorporeal right of property in the land itself.²

Licenses.—An authority to do some act or series of acts on the land of another, without passing any estate in the land, is called a *license*, and imparts to the *licensee* rights resembling, though not identical with, an easement. A license may be created by parol, but if it constitutes a permanent right or confers any interest in the land it must be by grant; and when a license is coupled with an interest, by reason of the payment of price or other act, it has been held that the authority conferred is not a mere permission, but amounts to a grant which obliges the grantor and vests

¹Huntington v. Asher, 96 N. Y. 604.

²Post v. Pearsall, 22 Wend. (N. Y.) 425; Waters v. Lilley, 4 Pick. (Mass.) 145.

legal property in the grantee.¹ It may be said, however, that licenses which, in their nature, amount to a grant of an estate, though for ever so short a time, are properly considered as leases.²

A license, being a mere privilege founded in personal confidence, ceases with the death of either party, or with a sale or conveyance of the land, and cannot be transferred by the licensee, while, if executory, it is revocable at any time at the pleasure of the licensor.³ When executed, in whole or in part, the question of revocation becomes one of great difficulty to properly determine; but usually a court of equity will not permit the revocation of a license where it has been given to influence the conduct of another and has caused him to make large expenditures or valuable improvements.⁴

A license operates as a protection for every act done under it while in force, but after revocation the licensee will become a trespasser and as such may be evicted by the landowner.⁵

The main difference between an easement and a license lies in the fact that the former must arise in grant, while the latter, conveying no estate or interest in the land, may rest in parol; yet the distinction is very subtle, and it becomes difficult in many cases to discern a substantial difference between them.

Franchises.—In its original form a *franchise* was a royal privilege or prerogative of the king, subsisting in the subject by a grant from the crown; and except that the grant comes from the people in their sovereign capacity, the general features have not been changed in this country. The

¹ *Rerick v. Kern*, 14 S. & R. (Pa.) 267; *Metcalf v. Hart*, 3 Wyo. 513. ⁴ *Flickenger v. Shaw*, 87 Cal. 126; *Thomas v. Irrigation Co.*, 80

² *Cook v. Stearns*, 11 Mass. 536. Tex. 550.

³ *De Haro v. United States*, 5 Wall. (U. S.) 599; *Mumford v. Whitney*, 15 Wend. (N. Y.) 380. ⁵ *Kremer v. Railway Co.*, 51 Minn. 15.

term is ordinarily applied to grants for the maintenance of bridges, ways, ferries,¹ etc.

The grant of a franchise creates a vested property right, and, unless expressly restricted to the person of the grantee as an individual privilege, is alienable and descendible in the same manner as other real estate.²

The creation, duration and extent of franchises are matters of statutory regulation in all the states. In late years they have usually been confined to corporations.

Burial lots.—As a rule the purchaser of a cemetery lot takes no title to the soil. The grant is in the nature of a license or privilege to make interments in the described plot, exclusive of others, so long as the ground shall remain in such use.³ Such right is, however, real property. It may itself be sold and transferred to others, if nothing in the grant prevents, and is to be treated generally as an incorporeal hereditament.

¹ Under the English law the title included a large number of subjects wholly unknown in the United States, as forrest, chase, free-warren, fishery, etc.

² Dufour v. Stacey, 90 Ky. 288;

Chadwick v. Haverhill Bridge, 2 Dane, Abr. 686; Lippencot v. Alendar, 27 Iowa, 460.

³ Kincaid's Appeal, 66 Pa. St. 411; Raynor v. Nugent, 60 Md. 515.

CHAPTER II.

ESTATES IN REAL PROPERTY.

Defined and classified.—The specific degree of interest which a person has in real property is called an *estate*. The owner, or, more properly, the holder, of such interest is technically termed a *tenant*.

The two main ingredients of estates are *quantity* and *quality*, the former having reference to their duration and extent, the latter to the tenure by which they are held and the manner of their enjoyment.

Estates are classed as *legal* and *equitable*, the former being those which have their origin and derive their qualities and incidents from the common law, and the latter those which are derived from the rules and principles which prevail in courts of equity. Formerly every estate was legal, in the proper acceptation of that term, and in contemplation of law there is and can be but one estate, which may properly be denominated the legal estate. But the introduction of what were known as uses, and the subsequent origination of trusts, where one party held the title, but upon some trust or confidence for another, early led the court of chancery to take cognizance of the rights of the beneficiary, and thus grew up a double ownership of lands so situated. As a rule, any legal conveyance will have the same effect upon an equitable estate that it would have on a like estate at law.

Estates have further been classified by elementary writers as *absolute* and *conditional*, but these terms must be regarded only as convenient expressions. Conditions may be annexed to any kind of an estate, but do not in themselves constitute estates, nor do they partake of the essential characteristics of same.

At common law estates were highly artificial in their creation and complex in character, but in the United States the nature and quality of estates in land have been formally defined and fixed by statute, and while the common-law nomenclature has been generally retained, the common-law incidents have, as a rule, been greatly modified or abolished.

For the purposes of clearness and accuracy in the ascertainment of proprietary rights in land, elementary writers, from a very early period, have considered estates under the following heads:

- I. With respect to the quantity of interest possessed by the tenant.
- II. With respect to the time of the enjoyment of such interest.
- III. With respect to the number and connection of the tenants.
- IV. With respect to the terms and manner of enjoyment.

The classification applies to either legal or equitable interests, and is, perhaps, the most convenient that has yet been devised. In the following paragraphs an effort will be made to examine briefly the general characteristics of estates under these heads, treating first of estates at law and following with estates regarded by courts of equity.

I. ESTATES CONSIDERED WITH RESPECT TO THE QUANTITY OF INTEREST POSSESSED BY THE TENANT.

Classified and distinguished.—The *quantity* of interest a tenant may have in land is measured by its duration and extent; and this occasions the primary division of estates into (1) such as are *freehold*, and (2) such as are *less than freehold*. These terms, though still retained in the nomenclature of the law, have lost their original significance. A freehold estate is described in the old books as an interest in lands held by a free tenure,¹ for the life of the tenant, or

¹ Upon the introduction of the base tenure. The tenant who held feudal law all lands in England by a free tenure had always a right became holden either by a free or to the enjoyment of the land for

that of some other person, or for some uncertain period. The test seems to lie in its indeterminate duration; for if the utmost period of time to which an estate can last is fixed and determined, it is not, under the common-law rules, an estate of freehold.

This early division of estates seems to have met the concurrence of later writers on real property, and in many states has received an official recognition by legislative enactment.

1. *Estates of Freehold.*

Freeholds, or estates of indeterminate duration, are in turn divided into estates of *inheritance* or in fee, and estates *not of inheritance*, or for life. At common law the former was subject to a further division into *absolute* and *limited* estates of inheritance, but this distinction has been abolished in the United States, although a faint resemblance yet exists, as will hereafter be shown.

Fee-simple.—Freehold estates of inheritance are usually denominated estates *in fee*, a name borrowed from the ancient land system of England, but of far greater import here than there. It signifies an absolute estate of inheritance, free from any restrictions to particular heirs, and is the largest estate and most general interest that can be enjoyed in land, being the entire property therein, and confers an unlimited power of alienation.¹ The estate is wholly comprised in the word “fee,” although it is customary to describe it as a “fee-simple” or even a “fee-simple absolute.” It has been said that the term “simple” was added for the purpose of showing that the estate is descendible to the

his life at least, and could not be dispossessed, even for the non-payment of his rent or the non-performance of his services; whereas the tenant who held in villenage might be turned out at the pleasure of his lord; the person holding by a free tenure, therefore, was

called a freeholder, because he might maintain his position against his lord. See Cruise, Dig., tit. I, § 16.

¹ Haynes v. Bourn, 42 Vt. 686; Currier v. Gale, 9 Allen (Mass.), 525.

heirs generally, without restraint to the heirs of the body, etc.,¹ and possibly, if the American estate were identical with its English prototype, this explanation would have significance; but, as a matter of fact as well as law, the addition of the word "simple" adds nothing to the force or comprehensiveness of the term.²

The creation of the estate was formerly very technical, and was raised only by a grant to a man and his heirs. For many years this was the rule in the United States; but more recently the statute has abrogated the common-law rule, and every estate in lands which may be granted, conveyed or devised is deemed a fee-simple or estate of inheritance, if a less estate is not limited by express words or created by construction or operation of law;³ and generally the question of the estate transferred is determined rather by the end sought to be attained by the grantor than by the language employed.⁴

Fee-tail.—As previously stated, estates of inheritance were formerly divided into absolute and limited estates; the former called a *fee-simple*, the latter a *fee-tail*. It would seem that originally donations of land were simple and pure, without any condition being annexed to them. In time it became customary to make grants of a more limited nature by which the estate was restrained to some particular heirs of the grantee, exclusive of others, as, to the heirs of a man's body, by which only his lineal descendants were admitted, in exclusion of collateral heirs. These were known as estates in fee-tail, being estates of inheritance, but descendible only to some particular heirs of the person to whom they were granted and not to his heirs-general.⁵ The object was to preserve great landed properties intact to particular fam-

¹ Wright, Ten. 146; 2 Black. Com. 106; 1 Prest. Est. 420.

⁴ Hawkins v. Champion, 36 Md. 83; Kirk v. Burkholtz, 3 Tenn. Ch. 425; Brislain v. Wilson, 63 Ill. 173.

² Jecks v. Toussing, 45 Mo. 167; 2 Wash. Real Prop. 77.

⁵ Consult 1 Spence, Eq. Jur. 140;

³ Leiter v. Sheppard, 85 Ill. 242; 2 Black. Com. 112. Merritt v. Disney, 48 Md. 344.

ilies by restricting the power of alienation; and the estate continued so long as there was posterity in the regular order of descent, but determined as soon as it reached an owner who died without issue.

One of the marked characteristics of American law is its abhorrence of perpetuities and all devices calculated to place restraints upon free alienation. This early became manifest in respect to estates-tail; and while the estate cannot be said to be altogether abolished, it has been so modified that when land is given to one and the heirs of his body begotten, the entail extends only for one degree. Thus the immediate grantee would take a life estate, while the second taker would have the remainder in fee.¹

It will be seen, therefore, that a freehold estate of inheritance is practically comprised in the one estate of the fee.

We come now to consider freehold estates *not of inheritance*, of which there is strictly but one kind though assuming a variety of forms.

Estates for life.—An estate for life, the duration of which is confined to the life or lives of some particular person or persons, or to the happening or not happening of some uncertain event, is a freehold interest in lands, both at common law and under the statute. It confers upon the tenant the possession and enjoyment of the land during the continuance of his estate, while the absolute property and inheritance of the land itself is vested in some other person.

Such estates are created in two ways: either expressly, as by deed or other legal assurance, or by the operation of some principle of law; but the incidents are much the same in either case. Whenever lands are conveyed to a man for the term of his own life he is called *tenant for life*; but when he holds for the life of another he is, in technical parlance, *tenant pour autre vie*.²

¹ This is a matter of statutory regulation, but the text states the general statutory rule. ² 2 Black. Com. 120; Clark v. Owens, 18 N. Y. 434.

Estates for life will generally endure as long as the life or lives for which they are granted; but there are estates for life which may determine upon future contingencies before the death of the person to whom they are given. Thus, if an estate be given to a woman so long as she remains single, or during her coverture, or so long as a grantee may dwell in a particular place, etc.,—in all these cases the grantees have estates for life, determinable on the happening of uncertain events.¹

Every tenant for life has a right to the full use and enjoyment of the land, and of all its annual profits, during the continuance of the estate.² He also has the power of alienating his whole interest,³ or of creating out of it any less estate than his own,⁴ unless restrained by positive condition; and while any attempt to create a greater estate than his own must necessarily be void, upon the principle that a man cannot convey that which he does not possess, yet his deed will be effective to pass whatever interest he has.⁵

Incident to estates for lives, and to a large extent also to estates for years, is the right of the tenant to what are technically known as *estovers*, or the right to cut wood from the premises for fuel or for use upon the grounds;⁶ also to *emblemments*, or those crops which are the growth of annual planting and culture.⁷ On the other hand, the tenant is restricted from committing *waste*, or doing that which tends to injure or impair the value of the inheritance. Waste is described as *voluntary*, as where some act is performed which

¹ Jackson v. Meyers, 3 Johns. (N. Y.) 388; Hurd v. Cushing, 7 Pick. (Mass.) 169.

² Coke, Litt. 55a; 2 Black. Com. 122; McCormick v. McCormick, 40 Miss. 763; Stewart v. Doughty, 9 Johns. (N. Y.) 108.

³ Roseboom v. Van Vechten, 5 Denio (N. Y.), 414.

⁴ Jackson v. Van Hoesen, 4 Cow. (N. Y.) 325.

⁵ Stevens v. Winship, 1 Pick. (Mass.) 318; Rogers v. Moore, 11 Conn. 553; Dennett v. Dennett, 40 N. H. 505. This is a statutory rule in a majority of the states.

⁶ Hubbard v. Shaw, 12 Allen (Mass.), 122; Smith v. Jewett, 40 N. H. 532.

⁷ Stewart v. Doughty, 9 Johns. (N. Y.) 108; Penhallow v. Dwight, 7 Mass. 34.

impairs the value of the fee; or *permissive*, as where, by the omission of some duty, an injury results to the inheritance.¹

It is not an uncommon practice to grant estates to persons for their *natural* lives, and this term is frequently employed in creating life estates by will. The expression grew out of conditions which formerly prevailed in England when it was customary to limit estates for life in this manner lest the civil death of the donee might terminate the estate.² At present, and in the United States, the expression is practically without meaning, as we have no civil death.

Dower.—Among the life estates derived from the common law is that which a widow acquires in a certain portion of her deceased husband's lands, for her support and maintenance. This estate is known as *dower*, and is said to have been derived from the Germans, among whom it was a rule that a virgin should have no marriage portion, but that the husband should allot a part of his property for her use in case she survived him.³ From an early day this seems to have been a part of the common law of England, receiving frequent mention in the royal charters and concessions, and at Littleton's time had assumed much the same condition that it retains to-day.⁴

But the common-law right of dower no longer exists in the United States, the rights of the surviving wife in the real estate of her deceased husband being those created by statute alone, and whatever incidents may have attached to the ancient estate have either been swept away or incorporated in the rights derived under the statute. No uniform measure, either as to quantity or quality, has been adopted; but in the main the estate conferred upon the widow conforms to that of the common law, and consists of the use,

¹ Sackett v. Sackett, 8 Pick. (Mass.) 312; Proffitt v. Henderson, 29 Mo. 327; McGregor v. Brown, 20 N. Y. 117.

² Wms. Real Prop. 103; 2 Wash. Real Prop. 117.

³ Cruise, Dig., title VI.

⁴ Coke, Litt, 11a; 2 Black. Com. 135.

during her natural life, of one-third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage.

During the life-time of the husband the wife has only an inchoate right, which is not an estate in the land, but a mere contingent interest that attaches to the land as soon as there is the concurrence of marriage and seizin.¹ This interest becomes fixed and certain upon the death of the husband, and after it has been admeasured and assigned it develops into a freehold estate.² During coverture the wife's inchoate right of dower is incapable of being transferred or released, except to one who has already had, or by the same instrument acquires, an independent interest in the land.³ Nor is this right such an interest as can be leased or mortgaged;⁴ neither can a married woman bind herself personally by a covenant or contract affecting her right of dower during the marriage. No act of the husband alone, during the marriage, can bar or extinguish this interest; but a woman may be barred of her dower by jointure, settled upon her before marriage, or by joining with her husband in a deed of conveyance, properly acknowledged. The release of dower which a woman makes by joining with her husband in a conveyance of his land operates against her only by estoppel, however, and can be taken advantage of only by those who claim under that conveyance;⁵ and if the conveyance is void, or ceases to operate, she is again clothed with the right which she has released. But in all cases where the wife unites with her husband in a conveyance properly executed by her, which is effectual and operative against him, and which is not superseded or set aside as against him or

¹ *Witthaus v. Schack*, 105 N. Y. 40; *Tompkins v. Fonda*, 4 Paige 332. (N. Y.), 448.

² *Elmdorf v. Lockwood*, 57 N. Y. 322; *Johnson v. Montgomery*, 51 Ill. 185; *Sutherland v. Sutherland*, 69 Ill. 481. ⁴ *Croade v. Ingraham*, 13 Pick. (Mass.) 33.

⁵ *Mallony v. Horan*, 49 N. Y. 111; *French v. Crosby*, 61 Me. 502; *Locket v. James*, 8 Bush (Ky.), 28.

³ *Robinson v. Bates*, 3 Met. (Mass.)

his grantee, her right of dower is forever barred and extinguished for all purposes and as to all persons.¹

Upon the death of the husband the inchoate right of the wife, acquired by the marriage, becomes absolute; yet she has no estate in the lands of her deceased husband until her dower has been admeasured and assigned,² and her rights therein can only be released to the owner of the fee or to some one in privity with the title by his covenants of warranty. After assignment the widow acquires an estate of freehold in the land allotted in severalty, and her life estate therein possesses all the attributes of other estates for life, including the right of alienation.³

Curtesy.—Another life estate derived from the common law is that which a husband acquires in his wife's lands by reason of the marital relation, called an estate by the *curtesy*. Notwithstanding that this estate is derived from the common law it is not peculiar to England, but may be found, more or less modified, in the ancient laws of the other parts of the British islands, and the northern continental nations. The full title of this ancient estate was "estate by the curtesy of England," and was so called for the reason that, unlike dower, it was not regarded as resting upon any moral foundation, and was therefore granted as a simple curtesy or favor of the law of England.⁴

Originally this estate was raised only when the husband had issue by the wife; for before that event he had only an estate during their joint lives. But from a very early period the rule seems to have prevailed that a husband who had issue should retain the lands of his deceased wife during his own life, and when the customs of the Normans were reduced to writing this law was inserted among them.⁵

¹ *Elmdorf v. Lockwood*, 57 N. Y. 322; *Welch v. Dutton*, 79 Ill. 465.

⁴ 2 Black. Com. 126; Coke, Litt. 30a.

² *Johnson v. Montgomery*, 51 Ill. 185.

⁵ Probably during the reign of Henry I.

³ *Hoots v. Graham*, 23 Ill. 81.

While the right of the husband as tenant by the curtesy has been expressly given by statute in some of the states, and incidentally recognized as an existing legal estate in others, yet in a majority of them tenancy by the curtesy has been abolished, the husband being given a statutory allowance from the deceased wife's estate, the quantity and quality varying in different jurisdictions. In many states the husband and wife are made statutory heirs to each other; and in such cases the husband takes the same share in the deceased wife's estate which she would, on surviving, take in his. In others the estate has been reduced to extremely meager proportions, and accrues only in such lands as the wife owned at the time of her death, and of which she had made no valid disposition by last will and testament.¹

Nor is it longer necessary that there should be birth of issue to raise the estate, and marriage, without respect to issue, is sufficient to confer the right if recognized at all.

Homestead.—To the estates derived from the common law the statute has added another, which, in its essential characteristics, has no analogy in the law. It is called a *homestead*, and is a constitutionally guaranteed right annexed to land, whereby the same is exempted from forced sale under execution for debt. In many — perhaps a majority — of the states the homestead right is but a mere privilege of occupancy against creditors, the continuance of which depends upon the continuance of prescribed conditions;² but in others it has been raised into an estate, limited only as to its value, and not by any specific degree of interest or character of title in the particular property to which it attaches.³ In such cases, where the worth of the property does not exceed the statutory valuation, the estate practically embraces the entire title and interest of the

¹Consult local statutes. There is no uniformity of rule in regard to this estate even where recognized.

308; Drake v. Kinsell, 38 Mich. 232; Barker v. Dayton, 28 Wis. 368.

³See Kerley v. Kerley, 13 Allen (Mass.), 287; Burns v. Keas, 21 Iowa, 260; Barney v. Leeds, 51 N. H. 272.

²Casebolt v. Donaldson, 67 Mo.

householder therein, leaving no separate interest in him to which liens can attach or which he can alien distinct from the estate of homestead.¹

So far as the estate bears resemblance to the common-law estates, its general features are more nearly allied to estates for life; and modern writers, whenever an attempt has been made to definitely locate it, have usually classed it in that category.²

The estate of homestead, having been raised by law in furtherance of public policy³ as a protection to the family, is personal in its character, and exists only in favor of one who already possesses some other recognized estate in the land. It is therefore incapable of alienation except in connection with other interests, but when so joined may be a proper subject of sale, mortgage, or release. The interest of the householder, if a married man, is always shared by the wife, and her consent, as manifested by conveyance, is always necessary to complete the devolution of title.⁴

The estate or right may be lost or waived by abandonment,⁵ but a mere temporary absence will not, as a rule, entail a forfeiture;⁶ nor will a removal ordinarily be sufficient to terminate the right until a new homestead has been acquired elsewhere.⁷

2. *Estates less than Freehold.*

Defined.—Where the quantity of interest possessed by the tenant is of a determinate character, either by express limitation or through the volition of some other person, it

¹ Merritt v. Merritt, 97 Ill. 243. ⁵ Green v. Marks, 25 Ill. 221; And see Allen v. Cook, 26 Barb. Dunton v. Woodbury, 24 Iowa, 76; (N. Y.) 374; Locke v. Rowell, 47 Tillotson v. Millard, 7 Minn. 520. N. H. 49; Folsom v. Carli, 5 Minn.

337; Smith v. Estell, 34 Miss. 527. ⁶ Tomlinson v. Swinney, 22 Ark. 400; Holden v. Pinney, 6 Cal. 234;

² See 1 Wash. Real Prop. 342. Austin v. Swank, 9 Ind. 112.

³ Robinson v. Wiley, 15 N. Y. 494. ⁷ Woodbury v. Luddy, 14 Allen

⁴ Hutchins v. Huggins, 59 Ill. 33; (Mass.), 1; Thoms v. Thoms, 45 Size v. Size, 24 Iowa, 580; Dearing Miss. 275. v. Thomas, 25 Ga. 224.

lacks the essential feature of a freehold, and, although an interest in land, yet partakes strongly of the nature of personality. For this reason this class of estates are usually denominated *chattels real*. These estates consist nominally of four kinds, viz.: (1) for years; (2) at will; (3) from year to year; and (4) by sufferance. For all practical purposes, however, estates of this kind are comprehended under the first head.¹

Estates for years.—While the estate for years was formerly characterized by numerous subtleties and refinements, yet in its modern aspects, particularly as created in the United States, it is simple in form and popular in use, and, with the exception of the fee, is the most common estate known to our law. In its essentials it is a right to the possession of land for a certain specified time, and, unlike estates for life, is never created by operation of law but always by the act or contract of the parties. It is inferior in rank to a life estate, however long it may last, and, not rising to the dignity of a freehold, is at best but a chattel interest.² It is created and perfected by the execution and delivery of a deed or lease for the term,³ and in this respect differs materially from the old estate of the English law, which, for its consummation, required an actual entry.⁴ It may be limited to commence presently or *in futuro*,⁵ and, unless restricted by the terms or conditions of the grant, may be sold and assigned the same as other real property.⁶

An estate for years may be terminated by expiration of its own limitation, by a surrender of the term prior to that

¹ Consult 2 Black. Com. 140; Wms. Real Prop. 195; 1 Wash. Real Prop. 195.

² See 2 Kent, Com. 342; 1 Wash. Real Prop. 310; 1 Platt, Leases, 3.

³ 4 Kent, Com. 97; Den v. Johnson, 3 Green (N. J.), 116; Allen v. Jaquish, 21 Wend. (N. Y.) 635. A lease for one year may generally be created by parol.

⁴ Before entry the lessee had only a right of entry, called in law *interesse termini*. Wms. Real Prop. 395.

⁵ Whitney v. Allaire, 1 Comst. (N. Y.) 305.

⁶ Wms. Real Prop. 414; Robinson v. Perry, 21 Ga. 183.

event, by forfeiture for condition broken, and in some instances by merger.¹

Being but chattel interests, estates for years do not descend to the heir of the person last seized or possessed of them, but vest in the executor or administrator of the deceased in the same manner as other chattels, and this without regard to the length of the period they may cover.²

Estates at will.—A tenant at will is one who has no sure or certain estate, but holds at the pleasure of his lessor, who may, at any time, dispossess him.³ The interest of a tenant at will is the most precarious that can be had in real property, and because the lessor may determine his will and oust the tenant whenever he pleases, such tenant possesses nothing that can be granted by him to a third person.⁴

Estates at will, however, in the strict and technical sense of the term, have well nigh become extinguished under the operation of judicial decisions and legislative enactments, and the tendency of the law has been to construe such estates into tenancies from year to year, or even from month to month, the character of the land and the reservation of rent having much to do with shaping the term. In almost every instance a notice to quit is now necessary to determine a right of occupation, and the length of notice is quite generally fixed by statute, special reference being had to the nature of the contract of entry and the character of the property.

Estates by sufferance.—The terms “at will” and “by sufferance” are very frequently employed in conjunction to indicate any estate of indeterminate duration depending solely on the pleasure of the landlord. As a matter of law, however, they are entirely separate and distinct. A tenant by

¹ Wash. Real Prop. 546.

⁴ See King v. Lawson, 98 Mass.

² Chapman v. Gray, 15 Mass. 445; 309; Reckhow v. Schanck, 43 N. Y. Murdock v. Ratcliff, 7 Ohio, 119. 448; Dingley v. Buffum, 57 Me.

³ Coke, Litt. 55a; 2 Black. Com. 381.
265; 2 Wash. Real Prop. 580.

sufferance, technically speaking, is one who, having been originally lawfully invested, continues to hold over after the determination of his estate, and is by the owner suffered to remain in possession.¹ In the former case, the tenant having acquired possession by the consent of the owner, there is between them a privity of estate; in the latter, being much in the nature of a trespass, there is none.

Tenants by sufferance were not liable at common law to pay any rent, because it was the folly of the owners to suffer them to continue in possession after the determination of the preceding estate;² but the statute has generally reversed this, and as a penalty for withholding the property imposes upon the tenant double rent.

This class of tenants includes practically all persons who continue in possession, without agreement, after the determination of the particular estate by which they originally acquired same,³ and this without reference to the fact that the original contract may have provided for the recovery of rent should the tenant hold after the expiration of his lease.⁴ It has been held to include tenants for years whose terms have expired; tenants at will whose estates have been determined; grantors who have agreed to deliver possession by a certain day, and hold over; under-tenants holding after the expiration of the term of the first lessee; and generally all others who having rightfully come into possession continue to hold when such right has expired.⁵

II. ESTATES CONSIDERED WITH RESPECT TO THE TIME OF THEIR ENJOYMENT.

Defined and classified.—With respect to the time of their enjoyment, estates are classed as *in possession* or *in expectancy*, the former being where the tenant is entitled to im-

¹ 2 Black. Com. 150; 2 Wash. Real Prop. 616; Russell v. Fabyan, 34 N. H. 218; Livingston v. Tanner, 12 Barb. (N. Y.) 481.

² Cruise, Dig., tit. IX.

³ See Uridas v. Morrell, 25 Cal. 35.

⁴ Edwards v. Hale, 9 Allen (Mass.), 462.

⁵ See 2 Wash. Real Prop. 617; Coke, Litt. 57b; Smith, Land. and

mediate enjoyment, the latter where the right to such enjoyment is postponed to some future day. Of the former it is unnecessary to further advert. Estates in expectancy are further divided into estates in *remainder* and estates in *reversion*, the nature and characteristics of which will form the subject of succeeding paragraphs.

Estates in remainder.—A *remainder* may be defined as an estate limited to commence in possession at a future day, on the determination, by lapse of time or otherwise, of a precedent estate, created at the same time.¹ As, if a person seized of the fee of lands grants them to A. for twenty years, and after the determination of that period or term to B. and his heirs. In such event A. would be tenant for twenty years, with remainder to B. in fee. It will be observed, in the supposed case, that an estate for years is carved out of the fee and given to A.; and the residue or remainder of the estate is given to B. Yet, in contemplation of law, both of these tenancies constitute but one estate, each being a separate part of the whole. Both were created out of the same freehold estate of inheritance, and both subsist at the same time, the one in possession, the other in expectancy, the two when added together being equal only to one estate in fee.²

Estates in remainder are either *vested* or *contingent*, the former being where there is an immediate fixed right of future enjoyment, the latter where the right of enjoyment is to accrue on an event which is dubious or uncertain. In the former a present interest passes to be enjoyed in the future; in the latter no interest passes, and the limitation may never become effective.³ Thus, in the case which has just been considered, the remainder became vested in B. at

Ten. 25; Jackson v. Parkhurst, 5 Brown v. Lawrence, 3 Cush. (Mass.) Johns. (N. Y.) 128; Benedict v. 390.

Morse, 10 Met. (Mass.) 223; Smith v. Littlefield, 51 N. Y. 543. ² Consult 2 Black. Com. 163; 1 Wash. Real Prop. 535; Wms. Real Prop. 208.

¹ Coke, Litt. 143a; 2 Black. Com. 163; Booth v. Terrell, 16 Ga. 20; ³ See Brown v. Lawrence, 3 Cush.

the moment of the creation of the precedent estate in A., and could not be defeated.

Remainders and reversions are practically the same kind of an estate and are subject to the same incidents. They differ mainly in the manner of their creation. Thus, both have reference to a smaller precedent estate, called, during its continuance, the *particular* estate. It is immaterial to whom this particular estate is given; but if at the same time and with the grant of the particular estate the donor also disposes of the remaining interest to some other person, such interest is called a remainder; if no disposition is made of the fee after the determination of such particular estate, it remains in the donor and is called a reversion. Hence, it will be seen that a remainder always has its origin in the act of the parties; a reversion arises incidentally through operation of law.¹

Estates in reversion.—The second species of estates in expectancy is called a *reversion*, and may be defined as the residue of an estate left in the donor, or his heirs, commencing in possession on the determination of a particular estate granted. The principle on which the idea of a reversion is founded is, that where a person has not parted with his whole interest in lands, all of that which he has not given away remains in him, and the possession of same reverts or returns to him upon the determination of the preceding estate.² Thus, if a person seized in fee conveys his estate to A. for life with remainder to B. for life, he still retains the fee. But as the right to possession or enjoyment will only accrue upon the determination of the precedent estates, he is said to have an estate in reversion.

Estates in reversion are vested interests, the right to future

(Mass.) 390; Price v. Sisson, 13 N. J. 176; Moore v. Lyons, 25 Wend. (N. Y.) 144; Croxall v. Shererd, 5 Wall. (U. S.) 288. Com. 169; 1 Prest. Estates, 74. In this connection the inquiring student may refer to Fearn's Contingent Remainders for much

¹ Consult Wms. Real Prop. 241; Wash. Real Prop. 535; 2 Black.

² Wms. Real Prop. 241.

enjoyment being fixed, and such estates are alienable, devisable and descendible in much the same manner as estates in possession.

III. ESTATES CONSIDERED WITH RESPECT TO THE NUMBER AND CONNECTION OF THE TENANTS.

Defined and classified.—With respect to the number and connection of the owners, estates in land may be held in *severalty*, in *joint-tenancy*, and in *common*; the first being where all rights of ownership and possession are vested in one person; the second, where the rights of ownership and possession are vested in two or more persons jointly; and the third, where a separate right of ownership is vested in one person as an undivided interest which is united with those of other persons in the property.

The estate in *severalty*, or where one person holds in his own right with none other joined with him in point of interest, is the usual and ordinary form of estate, and requires no further mention.

Estates in joint-tenancy.—At common law, where lands are granted to two or more persons without any restrictive, exclusive or explanatory words, all of the persons named in the deed take a *joint-estate*, and are called *joint-tenants*. The estate arises only from grant, or by the act of the parties, and never by operation of law, and is characterized by the underlying principle of unity, which extends both to the interest, the title and possession.¹ In other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at the same time, and held by one and the same undivided possession, and for practical purposes the several tenants may be considered as constituting but one person.²

This union or entirety of interest gives rise to the princi-

¹ Coke, Litt. 180b; 2 Black. Com. ² Wms. Real Prop. 109; 2 Black. 179; 1 Prest. Est. 136; 1 Wash. Real Com. 180. Prop. 641.

pal incident of the estate, which is the *right of survivorship*. Thus, if a grant be made to two or more persons in joint-tenancy, and one of them shall die, such death will work no change in the estate, but the survivors continue to hold same to the exclusion of the heirs of the deceased co-tenant, and so in like manner it continues to exist until the last survivor is reached, when it becomes an estate in severalty in him.¹

As the right of survivorship was often attended with hardship and injustice, courts of equity at an early day took great latitude in construing against joint-tenancies on the ground of intent; while by statute in the United States the general rule now is that all estates vested in two or more persons are to be deemed tenancies in common, unless a different intention is clearly expressed or implied in the instrument creating the estate.²

While joint-tenancies may still be created by apt words, yet, as a general rule, their use is mainly confined to estates held by trustees, and, under certain circumstances, as explained in the succeeding paragraph, by husbands and wives.³

Joint-tenancies are dissolved by final vesture of the entire estate in the surviving tenant; by the alienation by any of the tenants of his share, in which event the tenancy becomes common; or by voluntary partition by the co-tenants.

Estates by entirety.— Another of the joint-estates derived from the common law is that which is created when a conveyance is made to husband and wife which does not state the manner in which they shall hold the land, and is denominated a *tenancy by entirety*. The conveyance, in such case, does not constitute them either joint-tenants or tenants in common; for they are, in legal contemplation, but one person, and hence unable to take by moieties. Both would

¹ 2 Black. Com. 183.

³ See *Appleton v. Boyd*, 7 Mass.

² See *Mattox v. Hightshue*, 39 Ind. 95; *Shepardson v. Rowland*, 28 Wis. 103; *Murray v. Haverly*, 70 Ill. 318. Compare *Barnhart v. Campbell*, 50 Mo. 597.

131; *Jones v. Crane*, 16 Gray (Mass.), 308; *Hill on Trust* 303; *Wms. Real Prop.* 111.

therefore be seized of the entire estate; neither could dispose of any part of same without the assent of the other, and upon the death of either the whole estate would remain in the survivor. This rule has not been materially changed by statute, and is accepted in a majority of the states. In such an estate there can, of course, be no partition, as neither has any separate interest, though it would seem that either spouse may transfer his or her interest to the other.¹

A married woman may, of course, take and hold real property as a joint-tenant, or tenant in common, with her husband; and where by a deed to herself and husband it clearly appears that the intent was to convey to her not merely as a wife, but separately, then by virtue of her individual right, as a common tenant with him, she has the power to dispose of her interest independent of him.²

In several of the states where the rule of entirety formerly prevailed, it has been held that the legal unity of husband and wife has been broken by the "married women's" acts, and that they take only as tenants in common. But estates which had vested prior to the acts in question are not affected, changed or modified by them.

A review of the statutes shows that the legislation of the states concerning the property rights of married women has been very uniform, but the judicial construction of similar statutes has been variant and contradictory. In some instances, as has been observed, courts have decided that statutes making joint-grantees tenants in common, and giving to married women the same rights in property as though they were sole, have effectually destroyed the common-law unity of husband and wife, and made them substantially separate persons for all purposes; but in a majority of states the declared effect of these statutes has been confined to their express terms, and they have been held to have no relation to or effect upon real estate conveyed to husband and wife

¹See *Donahue v. Hubbard*, 154 Mass. 537; *Enyeart v. Kepler*, 118 Ind. 34. ²*Jooss v. Fey*, 129 N. Y. 17.

jointly, and that, notwithstanding these statutes, they still take as tenants by the entirety.¹

Estates in common.— At common law where two or more persons acquire interests in land by several titles they are called *tenants in common*, and by statute a community of interests creates the same relation even though such interests accrue through a joint title, where the instrument of conveyance creating same does not expressly or impliedly provide for a different estate.

The only unity between tenants in common is that of *possession*. Thus, one tenant may hold in fee and another for life; again, one may take by descent and the other by purchase; so, too, the estate of one may have been vested for many years while that of the other may have commenced but yesterday. It will be seen, therefore, that the essential unities of interest, title, and time, which characterize an estate in joint-tenancy, have no application when an estate is held in common,² and, under the statute, notwithstanding all of these unities may be present on the creation of the estate, it will still be an estate in common.

Each tenant is seized of every part of the common property, and it is not in the power of any one to convey the whole thereof or any distinct portion of same;³ but as property indivisible in character is incapable of several possession by each tenant, it therefore follows that the possession of one is a constructive possession of the others.⁴ With respect to their interests, however, each tenant holds in severalty, and as there is no privity of estate between the tenants, each of them may sell and convey his individual right to a stranger.⁵

¹ *Bertles v. Nunan*, 92 N. Y. 152; 5 Conn. 363; *Duncan v. Sylvester*, *Bates v. Seeley*, 46 Pa. St. 248; 24 Me. 482.

Robinson v. Eagle, 29 Ark. 202; ⁴ *Colburn v. Mason*, 25 Me. 434; *McDuff v. Beauchamp*, 50 Miss. 531. *Brown v. Wood*, 17 Mass. 68; *Catlin v. Kidder*, 7 Vt. 12.

² 2 Black. Com. 191; 1 Prest. Est. 139; 1 Wash. Real Prop. 652. ⁵ *Butler v. Roys*, 25 Mich. 53;

³ *Peabody v. Minot*, 24 Pick. Mass.) 329; *Griswold v. Johnson*, *Barnard v. Pope*, 14 Mass. 434; *Jackson v. Tibbits*, 9 Cow. (N. Y.) 241.

Estates in common, and, as a rule, all joint-estates, may be changed to estates in severalty in specific portions of the common property by a voluntary, or, in some cases, compulsory, division of same, the act of division and segregation being technically known as *partition*.

Partnership holdings in realty are, in many respects, governed by the same general rules that apply to tenants in common; and for most purposes, as between themselves, this is regarded as the character of their ownership. But as between partners and third persons, or as between themselves where the rights of third persons are concerned, the relation is strictly one of partnership, and the property is regarded as a partnership effect;¹ that is, as the property of the firm, and not the individual property of each member of the firm. The effect of this is to render them for some purposes joint-tenants, with the right of survivorship for all purposes of holding and administering the estate until the obligations of the firm have been discharged.² Again, partnership in lands differs materially from a tenancy in common in reference to the power of disposal,³ as well as from the further fact that none of the partners have any claim to any specific share or degree of interest in the property as tenants in common have, but only to the proportion of the residue which shall be found to be due them respectively upon final balance and adjustment of the accounts, and liquidation of the claims upon the firm.⁴

¹ And for this purpose acquires some of the characteristics of personality. See *Mauck v. Mauck*, 54 Ill. 281; *Scruggs v. Blair*, 44 Miss. 406; *Moderwell v. Millison*, 21 Pa. St. 257. N. Y. 471; *Ware v. Owens*, 42 Ala. 212; *Holmes v. Self*, 79 Ky. 297.

³ See *Ruffner v. McConnel*, 17 Ill. 212; *Jackson v. Stanford*, 19 Ga. 14.

⁴ *Goddard v. Renner*, 57 Ind. 532; *Williams v. Love*, 2 Head (Tenn.),

² See *Fairchild v. Fairchild*, 64 80; *Hiscock v. Phelps*, 49 N. Y. 97.

IV. ESTATES CONSIDERED WITH RESPECT TO THE MANNER OF THEIR ENJOYMENT.

Defined and classified.—With respect to the terms upon which they are held, or the manner in which they are to be enjoyed, estates are said to be (1) *absolute* or (2) *on condition*. The terms upon which an estate is held is called *tenure*, a word which formerly implied much more than at present. By the feudal law of England every estate was conditioned on some service or other return to the lord of the fee, which was the tenure by which the estate was held.¹ In its feudal sense tenure is unknown in the United States, but every estate conditioned on the payment of rent or other service to the landlord is held upon a tenure; and in like manner where any act or event is annexed to an estate as part of or incident to the grant, the estate, in a proper sense, is held by a tenure. Estates upon condition are not, however, a distinctive class of estates similar to those we have just considered, nor do they, in any proper sense, constitute a distinct species. Conditions are simply qualifications of estates, and may apply to any quantity of interest in land.

1. *Absolute Estates.*

Nature and characteristics.—While the principal heads of this section are taken from the English law, yet, in its proper sense, no estate is held by the individual under the English land system in absolute ownership.² It is true that under that system the owner of an estate in fee may at his pleasure dispose of same, but this is practically nothing more than the liberty or privilege of putting another in his own place, who, like himself, will continue to hold the land as a tenant of the lord of the fee. If the land is held without restriction of any kind the estate is said to be absolute—or, as usually termed, a fee-simple absolute, but the king, as the great lord paramount, will continue to have the ultimate right.

¹ Consult 1 Spence, Eq. Jur. 135; ² See Wms. Real Prop. 17.
2 Black. Com. 53.

In the United States, however, where the doctrine of feudal tenures is now unknown, it is possible for one to possess an absolute estate.

When by the Revolution the domination of the mother country was thrown off, the state in its sovereign capacity succeeded to the titles of the king and became the proprietor of all the lands. But instead of lending them like a feudal lord to an enslaved tenantry, it sold them for a fair price, or, with more than princely generosity, conferred them upon its citizens as a reward for industry and courage in the development and settlement of the country, or in recognition of valor and patriotic devotion in its defense. Its patents all acknowledge a pecuniary or valuable consideration, and stipulate for no fealty or other feudal incident, and it may be truthfully said "the state is lord paramount as to no man's land."¹ However the title to land may have been derived, whether from state or federal government, or through pre-national grants, it is held in pure and free *alodium*, being the most ample and perfect interest that can be obtained in land, and denoting a full and absolute ownership, "a time in the land without end," with no duties to a superior lord, or services or fealty incident thereto. The allegiance which the citizen owes to the state is frequently spoken of as fealty,² but this is an obligation arising from our political economy, and is as binding on him who owns no land as on him who counts his acres by the thousands. It is an obligation, reciprocal to protection, resulting from and growing out of our political relations, and in no way affects the title to land more than to chattels.³

It is, however, a well-settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title,

¹ Wallace v. Harmstad, 44 Pa. St. 492; Van Rensselaer v. Smith, 27 Barb. (N. Y.) 157.

² See 2 Bouv. Law Dict. 585, art. "Tenure."

³ Wallace v. Harmstad, 44 Pa. St. 492; Carlisle v. United States, 9 Wall. 146.

holds it under the implied liability that its use may be controlled and regulated by the state in such a manner as not to interfere with the equal enjoyment by others of their property, nor be injurious to the rights of the community,¹ and subject to such laws as the legislature may enact, to regulate the mode of conveyance, descent, right of dower or other rights growing out of the domestic relations.² All property is held subject to those general regulations established by law which are necessary to the common good and general welfare.

2. *Estates on Condition.*

Generally considered.—Conditional estates are a portion of our inheritance from the feudal law, and originally grew out of the terms upon which fiefs were granted. They imply a holding by tenure, and for this reason, if none other, are not in accord with the genius of our institutions, which recognizes no superior lord holding reversions or other paramount rights, and is fundamentally opposed to the principles of ownership under allodial titles. Forfeiture, which is the inseparable legal incident of all strictly conditional estates, is not compatible with the modern American idea of full and complete ownership. It originated and was developed under a system radically different from that which obtains in the United States, and which recognized as the highest type of property in the subject only a leasehold interest; and although this interest might continue for an indefinite period of time and was dignified with the name of freehold, it was still dependent on conditions, and the reversion could never be lost to the ultimate lord.

The principle of forfeiture came to us with other inapt and inconsistent doctrines on the separation of the colonies, and has been retained through a series of years mainly because of a slavish and, in many cases, blind adherence to the

¹ *Commonwealth v. Alger*, 7 Cush. 53; *Commonwealth v. Tewkesbury*, 11 Met. 55.

² *Barker v. Dayton*, 28 Wis. 367.

formidable array of English precedents which American jurists have falsely endeavored to apply to our system of land titles and estates. But the original and inherent principles of allodial ownership, when unaffected by the doctrines of the common law, afford no room for reversionary rights in one who has parted with his title by an absolute conveyance; and the doctrine of conditional estates, so far as it is administered in this country, forms an anomalous proceeding, unsupported by principle and authorized by very doubtful precedent.

It is to be hoped that as the bench and the ranks of elementary writers continue to be recruited from men imbued with American ideas of American law, and freed from the harsh and inappropriate rules of our English inheritance, forfeiture of a fee-simple estate once vested will become an impossibility, and the more just and enlightened rule of compensation or performance will provide an adequate remedy for all breaches of covenants and conditions.

Defined and classified.—A *condition* has been defined as a qualification or restriction annexed to a grant of lands, whereby it is provided that in case a particular event does or does not happen, or in case either party to the grant does, or omits to do, a particular act, an estate shall commence, be enlarged, or defeated.¹

Conditions are classed as *precedent* and *subsequent*. Conditions precedent are such as must happen or be performed before an estate can vest or be enlarged. Conditions subsequent indicate something to be performed after an estate has vested, the continuance of the estate depending upon such performance. It is this class of conditions which has given rise to most of the litigation on the subject.

The legal effect of a condition precedent is to withhold the estate until performance; the legal effect of a condition subsequent is to defeat the estate already vested upon a

¹ See Coke, Litt. 201a; 2 Wash. Real Prop. 2; Laberee v. Carleton, 53 Me. 211.

breach or non-performance. But although the respective effects of these are so divergent, it is not always easy to determine whether the condition is precedent or subsequent from the language employed. If, however, the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate, or if, from the nature of the act to be performed and the time required for its performance, it is evidently the intention of the parties that the estate shall vest and the grantee perform the act after taking possession, then the condition is subsequent.¹

Subsequent conditions, as they tend to defeat estates, are not favored by the courts. Forfeitures are said to be odious, and unless the conditions are clearly and minutely expressed, the courts will, as a rule, eagerly lay hold of any plausible feature to sustain the grant.²

A grant of land upon condition subsequent conveys the fee with all its qualities of transmission. The condition has no effect to limit the title until it becomes operative to defeat it; and the possibility of reverter, which is all that remains in the grantor, is not an estate in the land.³ The estate held by the grantee will, of course, remain defeasible until the condition be performed, destroyed, or barred by limitation or estoppel.⁴

Conditions are further classified as *expressed* and *implied*, the former being those which are declared in express terms in the grant creating the estate; the latter are those which

¹ Underhill v. Saratoga, 20 Barb. (N. Y.) 455; Finlay v. King's Lessee, 3 Pet. (U. S.) 374. Hubbard v. Hubbard, 97 Mass. 188. Blackstone defines an estate so granted as a base or qualified fee.

² Woodworth v. Payne, 74 N. Y. 196; Hunt v. Beeson, 18 Ind. 380; Taylor v. Sutton, 15 Ga. 103. It is a fee because it may possibly endure forever, and it is qualified because its duration depends upon collateral circumstances which

³ Shattuck v. Hastings, 99 Mass. 23; Vail v. Railroad Co., 106 N. Y. 283. qualify and debase the purity of the donation. See, also, Wiggins

⁴ Osgood v. Abbott, 58 Me. 73; Ferry Co. v. Railroad Co., 94 Ill. 83.

the law presumes, either from their being always understood to be annexed to certain estates or as annexed to estates held under certain circumstances.

Restrictions on the use of property conveyed are of more frequent occurrence, but, unless also conditions subsequent, do not work a forfeiture in their violation. They consist usually of building regulations, sanitary measures and matters involving the good morals of community, as prohibition of the sale of intoxicating liquors on the premises, etc. They are designed ordinarily to prevent such use of the premises by the grantee and those claiming under him as might diminish the value of the residue of the land belonging to the grantor or impair its eligibility for particular purposes, and that such a design is a legitimate one, and may be carried out consistently with the rules of law by reasonable and proper restrictions, cannot be doubted. Every owner of property has the right to so deal with it as to restrain its use by his grantee within such limits as to prevent its appropriation to purposes which will impair the value or diminish the pleasure of the enjoyment of the land which he retains.¹ Such restrictions are recognized and upheld by the courts, and the violation of same will be restrained by injunction.²

¹The only limitation on this right is that it shall be exercised reasonably, with due regard to public policy, and without creating any unlawful restraint of trade. Nor does there seem to be any doubt that in whatever language such a restraint is couched, whether in the technical form of a condition or covenant, or of a reservation or exception, or merely by words which give to the acceptance of the deed by the grantee the force and effect of a parol agreement, it is binding as between the immediate parties thereto, and may be

enforced by or against their respective assigns. *Whitney v. Railway Co.*, 11 Gray (Mass.), 359; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Watrous v. Allen*, 57 Mich. 362. And see *Warvelle on Vendors*, p. 439.

²*Dorr v. Harrahan*, 101 Mass. 531; *Cowell v. Col. Springs Co.*, 100 U. S. 55; *Clark v. Martin*, 49 Pa. St. 289. Where restrictions upon building are inserted in a deed as a part of a scheme for a plan of improvement, such restrictions, as a rule, though spoken of as conditions, are not to be deemed

A condition, whether precedent or subsequent, ceases to be of force or binding effect (1) when the condition imposed is impossible; (2) requires the performance of what is contrary to law or good morals; or (3) is repugnant to the estate granted.¹ So, too, it may be waived by the person for whom it was raised or who may be entitled to its enforcement,² either expressly or by implication of law;³ and performance may be excused or deferred where circumstances are such as to preclude same.⁴

Operation and effect of conditions.—As a general rule the fact that an estate is subject to condition does not in any way affect its capacity for alienation, or of being devised, or descending in the same manner as an indefeasible estate, but the purchaser, devisee, or heir, takes it subject to whatever conditions may be annexed to it.⁵

Nor will a mere breach of any or all of the conditions upon which an estate has been conveyed have the effect of revesting the title in the grantor.⁶ Such event would give him an option to declare a forfeiture, but this right he may waive either by express act or passive acquiescence.⁷ The authorities are unanimous in declaring that, to render a breach effectual and revest an estate forfeited as for condition broken, some action is required on the part of the grantor. If he is not in possession he must make an entry, or by some act equivalent thereto assert a continual claim, manifesting a determination to take advantage of the breach;⁸ if in possession, he must in some manner evidence

technical conditions whose breach involves forfeiture. *Ayling v. Kramer*, 133 Mass. 12.

¹ *Iron Co. v. Erie*, 41 Pa. St. 349; *Merrill v. Emery*, 10 Pick. (Mass.) 507.

² *Chalker v. Chalker*, 1 Conn. 79; *Hubbard v. Hubbard*, 97 Mass. 192.

³ *Williams v. Dakin*, 23 Wend. (N. Y.) 209; *Andrews v. Senter*, 32 Me. 397; *Guild v. Richards*, 16 Gray (Mass.), 326.

⁴ *Bradstreet v. Clark*, 21 Pick. (Mass.) 389.

⁵ *Taylor v. Sutton*, 15 Ga. 103; *Wilson v. Wilson*, 38 Me. 18; *Underhill v. Railroad Co.*, 20 Barb. (N. Y.) 455.

⁶ *Railroad Co. v. Neighbors*, 51 Miss. 412; *Kenner v. American Contract Co.*, 9 Bush (Ky.), 202; *Guild v. Richards*, 82 Mass. 309.

⁷ *Coon v. Brickett*, 2 N. H. 163.

⁸ *Osgood v. Abbott*, 58 Me. 73;

an intent to hold possession by reason of the breach.¹ Until this has been done the grantee holds his estate, liable to be defeated, but not actually determined by a forfeiture.²

By the rules of the common law, which discourage maintenance and litigation, nothing that lies in action, entry, or re-entry, can be granted over; and while this rule has in many respects been greatly relaxed and changed, it still holds good with regard to conditions, and no grantee or assignee of a reversion can take advantage of a re-entry by force of a condition broken. This privilege is confined to the grantor and his heirs, who alone may take steps to forfeit the estate; and if they neglect or refuse so to do, the title remains in the grantee for all practical purposes unimpaired.³

Generally any one may perform a condition who has any interest in it, or in the land whereto it is annexed;⁴ and when a condition is once performed, unless it is one which requires continual performance, it is thenceforth entirely gone, and the estate to which it was before annexed becomes absolute.⁵

Conditional limitation.—An estate upon condition differs from what is known as a *conditional limitation*, or, as it is sometimes called, a determinable fee. The estate in either case is conditional, but the distinction is that the former, while liable to defeat, yet requires some act to be done by the person who has the right to avail himself of the condition, and is not in fact determined until there has been an entry or some other equivalent demonstration; the latter, on the contrary, is determined by operation of law without any act by any person, and ceases to exist upon the happening of the event by which its limitation is measured.⁶ In the

Fonda v. Sage, 46 Barb. (N. Y.) 123;

Green v. Pettingill, 47 N. H. 375.

¹ Hubbard v. Hubbard, 97 Mass. 188.

² Stone v. Ellis, 9 Cush. (Mass.)

95; Spofford v. True, 33 Me. 283; Spect v. Gregg, 51 Cal. 198.

³ Smith v. Brannan, 13 Cal. 107;

Merritt v. Harris, 102 Mass. 328;

Norris v. Milner, 20 Ga. 563.

⁴ Joslyn v. Parlin, 54 Vt. 670.

⁵ Vermont v. Gospel Society, 2

Paine (U. S. C. Ct.), 545.

⁶ Miller v. Levi, 44 N. Y. 489;

former the reservation can only be made to the grantor or his heirs, who alone can take advantage of a breach of the condition, while a stranger may have the benefit of a limitation.¹

EQUITABLE ESTATES.

Generally considered.—In its early simplicity the common law did not admit of any estate in land that was not sustained by legal seizin and possession. In course of time, however, a right to the profits of lands, whereof another person had the legal seizin, was introduced, and, though not recognized by the common-law courts, received the sanction of courts of chancery under the name of a *use*. Subsequently statutes were enacted with the object of subjecting uses to the rules of the common law, and under their operation the ancient *use* developed into what is known as a *trust*. In modern law that which goes by the name of a trust is substantially the same as that which in the ancient books is called a use.

The exact origin of uses and trusts does not seem to be definitely known, but their adaptation from the Roman to the English law may be traced, in part at least, to the ingenuity of fraud; as by the interposition of a trustee the debtor thought to withdraw his property out of the reach of his creditor, the freeholder to intercept the fruits of tenure from the lord of whom the lands were held, and the body ecclesiastic to evade the restriction directed against the growing wealth of the church by the statutes of mortmain.²

The device grew with years into a highly complex and subtle system, most ingenious in its details and far reaching in its scope, and became incorporated into the common law of the United States together with numerous other old-

Henderson v. Hunter, 59 Pa. St. 340; Osgood v. Abbott, 58 Me. 73. ² 1 Spence, Eq. Jur. 436; 2 Black. Com. 328; Sand. Uses, 17; Wash.

¹ Southard v. Railroad Co., 29 N. Real Prop. 384.

J. L. 1; Owen v. Field, 103 Mass.

world exotics. But about the middle of the present century a series of radical and sweeping changes were introduced, by which the whole doctrine of uses and trusts, with all its refinements and subtleties and its accumulation of precedents and curious learning, was practically abolished, and by statute a few simple rules have been established to govern this branch of the law.

Uses.—It would seem that at quite an early period in the history of English law there prevailed a practice of one person conveying land to another upon a private agreement or understanding that the latter should hold the lands for the benefit or profit of the former or of some third person. The practice received a strong impetus during the reign of Edward III. by the action of the churchmen, who resorted to it to evade the operation of restrictive statutes, and to enable them to receive the rents and profits of land which, by those statutes, they were prohibited from holding in their own names. After this it came into general use by all classes.¹

It would naturally follow that while the rights of the real owner were so precarious and depended so entirely on the good faith of the nominal owner, that frequent breaches of the trust would be committed; and this induced the clerical chancellors of those times to rule, by analogy to the civil law, that the use so limited was binding in conscience, and new writs were invented to render same effective. At first chancery assumed no other jurisdiction in case of uses than to compel payment of the rents and profits to the beneficiary, but in time it advanced further and established the rule that a beneficiary had a right to call on the feoffee to uses, or nominal owner, for a conveyance of the legal estate, either to himself or to any other person he might appoint.²

Then grew up an elaborate and subtle system of uses regulated and settled by the court of chancery. Sometimes the doctrine was applied to useful purposes, by removing

¹See Black. Com. 328; Cornish on Uses, 12.

²Cornish on Uses, 12; 1 Spence, Eq. Jur. 338; Coke, Litt. 272a.

restraints on alienation, and enabling owners to exercise powers over land which were not allowed by the common law. But uses became so general, and were applied to such bad purposes, that at length they began to be regarded as an evil. Conveyances (feoffments) to use were generally made in secret, so that when a person had cause to sue for land he could not find the legal tenant. Husbands were deprived of their curtesy, widows of their dower; creditors were defrauded; feudal lords lost the profits of their tenures, and a general obscurity and confusion of titles prevailed.¹

As a remedy for these inconveniences several statutes were enacted, until finally in the reign of Henry VIII. an act was had, usually known as *The Statute of Uses*, the intention of which was to abolish uses by transferring the legal estate from the feoffee, the nominal owner, to the beneficiary, the use being changed, by operation of the statute, to a legal estate. This statute, in substance, has either been re-enacted in all of the states, or its principles recognized.

Trusts.—After the enactment of the Statute of Uses, the judges, by a strict construction, defeated in a great measure its practical effect. They held that there were some uses which the statute did not execute, and so uses were not wholly abolished, but still continued, under certain conditions, to be noticed and supported by the court of chancery under the name of *trusts*. A *trust*, therefore, may be not inaptly defined as a use not executed by the statute, and consists, in its essence, of an obligation arising out of a confidence.²

Trusts are said to be *express*, as when created by direct volition, or *implied*, as when a presumption is raised by law. They are further classified as *active* or *passive*, and *executed* or *executory*. Implied trusts are subject to a further division into *resulting* and *constructive* trusts, the former being where

¹ Cruise, Dig., tit. XII, ch. I.

² Cruise, Dig., tit. XII, ch. I; Gilbert, Uses, 74; Wms. Real Prop. 133.

the law raises a presumption as to the intention of the parties from their acts; the latter being raised, without any reference to presumed intention, for the purpose of preventing fraud.

The person creating a trust is called the *settler*, the person accepting the trust the *trustee*, and the person for whose benefit the trust is raised the *beneficiary* or *cestui que trust*. As a rule any estate or interest in lands may be made the subject of a trust, provided the settler has the legal power and the *cestui que trust* the capacity, the one to give and the other to receive, the beneficial interest intended.¹ So, too, any person capable of taking and holding the property of which the trust is declared, and possessed of sufficient legal ability to execute same, may properly be a trustee.²

A majority of the states have abolished passive trusts, where the trustee holds only the naked formal title, the whole beneficial interest in the land being vested in the *cestui que trust*; the statute, in such cases, confirming to such beneficiary a legal estate therein of the same quality and duration, and subject to the same conditions, as his beneficial interest.

The doctrine of resulting trusts from implication of law has been modified to conform to the rules respecting express trusts, but otherwise has not been materially affected by statute.

The whole subject of express trusts is almost purely statutory, and such trusts can only be raised for a few enumerated purposes, generally as follows: (1) to sell lands for the benefit of creditors; (2) to sell, mortgage or lease lands for the purpose of satisfying some charge thereon; (3) to receive the rents and profits of lands and to accumulate same for the benefit of some specified person; (4) to receive the rents and profits of lands and apply them to the use of some person for a definite period; (5) for the beneficial interest of some person when the trust is fully expressed and clearly

¹ Robinson v. Mauldin, 11 Ala. 977; Calkins v. Lockwood, 17 Conn. 154. ² Sutton v. Cole, 3 Pick. (Mass.) 240.

defined upon the face of the instrument creating it. In all cases trusts are subject to the rules prescribed by statute fixing the quantity and quality of estates.

Where the classes of express trusts are specifically enumerated by statute, the creation, for any purpose, of any trust not so enumerated vests no estate in the trustee; though if valid as a power, the land to which the trust relates remains in or descends to the persons otherwise entitled, subject to the execution of the trust as a power. No particular form of words is necessary to create a trust, and effect will always be given to the intention of the parties.¹

Powers.—Closely allied to trusts, and partaking somewhat of their nature, are *powers*, the creation, construction and execution of which are, in a majority of the states, governed by express statutory provisions. A power, as defined, is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform; and no person is capable, in law, of granting a power who is not at the same time capable of alienating some interest in the lands to which the power relates. Powers are *general* or *special*, and *beneficial* or *in trust*.² A power is general when it authorizes the alienation in fee, by deed, will, or charge of the lands embraced in the power, to any alienee whatever; and is a simple form of familiar occurrence. It is special when the appointee is designated, or where it authorizes a conveyance of a particular estate or interest less than a fee. A general or special power is beneficial when no person other than the grantee has, by the terms of its creation, any interest in its execution. A general power is in trust when any person, other than the grantee, is designated as entitled to the proceeds or other benefits to arise from the alienation of the lands. A special

¹ Fisher v. Fields, 10 Johns. 495; Saylor v. Plaine, 31 Md. 158. given is that which is now generally observed in this country,

² Kent, Com. 319; 2 Bouv. Law Dict. 356. though it differs somewhat from the common-law classification.

power is in trust when the disposition which it authorizes is limited to be made to any particular persons other than the grantee; or when any class of persons, other than the grantee, is entitled to any benefit from the disposition or charge authorized by the power. A power may be granted by a suitable clause contained in the conveyance of some estate in the lands to which same relates; or by devise contained in a last will and testament; and may be vested in any person capable in law of holding lands, but cannot be executed by any person not capable of alienating lands holden by such person. A power, technically speaking, is not an estate, but is a mere authority, enabling a person, through the medium of the statute, to dispose of an interest in real property vested either in himself or in another person;¹ and where a power is executed, the person taking under it takes under him who created the power, and not under him who executes it.² A power to sell land can only be exercised in the manner and for the precise purpose declared and intended by the donor, and when the purpose becomes wholly unattainable, the power ceases.³ In the construction of powers, the intention of the parties, if compatible with law, must govern; and the intention is to be determined from the instrument creating the power.⁴

MERGER OF ESTATES.

General principles.—It is a general rule that whenever a greater and a less estate meet in the same person, without any intermediate estate, the lesser becomes absorbed in the greater,⁵ the fusion being known as a *merger*. Thus, where the legal and equitable estates meet in the same person, without an intervening interest outstanding in a third person, the equitable becomes merged in the legal estate, the latter

¹ Burleigh v. Clough, 52 N. H. 268;
² Prest. Abstracts, 275.

² Legget v. Doremus, 25 N. J. Eq.
 122.

³ Hetzel v. Barber, 69 N. Y. 1.

⁴ Guion v. Pickett, 42 Miss. 77;
 Jackson v. Veeder, 11 Johns. 169.

⁵ Jackson v. Roberts, 1 Wend.
 (N. Y.) 478.

alone subsisting.¹ Merger is distinguished from *suspension*, which is but a partial absorption occasioned by the temporary union of two interests or estates, and differs from *extinguishment*, which implies the annihilation of a collateral subject, right or interest in the estate out of which it is derived. In practice, however, particularly in the United States, this distinction is rarely observed, and an extinguishment, in effect, will be regarded as a merger. Thus, in the example cited, where the legal estate and equitable ownership unite in the same person, the equitable interest, strictly speaking, is extinguished in the legal estate, upon the principle that a man cannot be a trustee for himself, but the distinction is so subtle that courts rarely recognize it.

While the rule of merger is said to be inflexible at law, yet in equity it is subject to many modifications, and when it becomes necessary to advance the ends of justice the two estates will always be kept separate.²

¹ Jackson v. Devitt, 6 Cow. (N. Y.) 310. Aiken v. Railroad Co., 37 Wis. 469;
Powell v. Smith, 30 Mich. 451.

² Huebsch v. Schnell, 81 Ill. 281;

CHAPTER III.

TITLE TO REAL PROPERTY.

Defined and classified.—As has been shown in the preceding chapter, the interest which a person may have in lands, tenements or hereditaments is described in the comprehensive term *estate*; the method of acquiring and right of holding same is denominated *title*. Title, therefore, is properly an incident of estates. In fact, in all sales or dispositions of real property the title is inseparably connected with the estate, and represents the right or authority for the enjoyment of the land, even as the estate represents the quality and extent of such enjoyment.

The primary classification of title is into (1) *original* and (2) *derivative*. Original title rests in some degree on fiction, and denotes that state of ownership beyond which inquiry cannot be made, the land being held in paramount right. Derivative title is any and all of the forms of title that flow from the original or paramount right. In its practical application this division is shown in the relations sustained by the sovereign and the people in their individual capacities.¹

Title may also be classified as *legal* and *equitable* — a distinction originally applied only to estates, but now extensively used to designate the manner of acquiring and holding them as well. The equitable title usually carries with it the beneficial interest in the land, together with the incidents of ownership, the legal title being held as a mere naked trust.

Custom has also introduced another species of classification, based on the impairments or defects which may exist in the muniments of the title asserted by a vendor, by which

¹ Consult Taylor, Civ. Law, 476; 2 Black. Com. 195; Burt. Real Prop., § 418; 3 Wash. Real Prop. 2.

the title is said to be either *doubtful* on the one hand, or *marketable* on the other. Marketable titles are those which a court of equity considers so clear that it will enforce their acceptance by a purchaser; a doubtful title, on the contrary, is one that a court will not go so far as to declare invalid, but only that it is subject to so much doubt that a purchaser ought not to be compelled to accept it.¹ The doctrine of marketable titles is purely equitable and of modern origin; at law every title is marketable.

In commercial parlance we often hear of "good" and "bad" titles, and not infrequently lawyers are betrayed into the use of these terms in framing opinions, etc. No such distinction, however, is known to the law. "Good" title is simply title; "bad" title is no title at all. A title, or a particular assertion of title, may be defective; but there are no comparative degrees of title, for even a "good" title would suggest a "better." The prevalence of the use, or rather misuse, of the terms seems to justify this digression.

ART. I. ORIGINAL TITLE.

Generally considered.—The original source of title, according to the rules of the common law, is the king, who, as the official head and sovereign representative of the nation, is the great lord paramount of all lands within the territorial boundaries of the country. He is the true and only source of legitimate ownership, and from him, either mediately or immediately, all the lands in the realm are held.²

The changed conditions of national life in the United States have not materially altered this ancient rule. It is still true that the government, either state or federal, representing the sovereignty of the people, is the original source of title to all lands not held under pre-national grants. The original

¹ *Richmond v. Gray*, 3 Allen (Mass.), 25. student may, with profit, read Hallam's *Middle Ages*. For secondary

² *Wms. Real Prop.* 118; 2 Black. Com. 53. In this connection the reading, Reeves' *History of English* is also recommended.

thirteen states, as also Texas, retained their lands on entering into the Union, and in these states the source of title is the state. In the remaining states, with but few exceptions, as Vermont, whose territory was claimed by New York and New Hampshire, etc.,¹ the original title to the soil was in the general government. All the lands in the territories, not appropriated by competent authority before they were acquired, are, in the first instance, the exclusive property of the United States, to be disposed of to such persons, at such times, in such modes, and by such titles as the government

¹ Kentucky was part of Virginia, Tennessee of North Carolina, and Maine was claimed by Massachusetts. The territory "northwest of the river Ohio" was originally claimed by Virginia, and was conveyed to the United States by the deed of cession of March 1, 1784, as a common fund for the use and benefit of all the states, "upon condition that the territory so ceded shall be laid out and formed into states, containing a suitable extent of territory, not less than one hundred nor more than one hundred and fifty miles square, or as near thereto, as circumstances will admit; and that the states so formed shall be republican states and admitted members of the Federal Union, having the same rights of sovereignty, freedom and independence as the other states" The state of North Carolina, by deed of cession dated February 25, 1790, ceded the territory now constituting the state of Tennessee; and the state of Georgia, by deed of cession dated April 24, 1802, substantially the same as the Virginia cession, conveyed the territory forming the present state of Alabama. New York, Connecticut and Massachusetts also made deeds of cession, but these were practically but quit-claims. The remaining territory was acquired by purchase and conquest. The cessions of Georgia, North Carolina and Virginia were accepted by the United States, and the municipal eminent domain held as a trust for the new states to be formed in conformity to the deeds of cession, the details to be regulated by the act of congress known as the ordinance of 1787. Upon the admission of the new states nothing remained to the United States, according to the terms of the agreement, but the public lands, and upon their disposal the power of the general government over these lands, as property, also ceased, leaving the state in undisputed sovereignty, including the ownership and dominion of her navigable waters and the soil under them. See *Pollard v. Hagan*, 3 How. (U. S.) 212; *Freedman v. Goodwin*, 1 McAlister, 142; *Ward v. Mulford*, 32 Cal. 365; *Farrish v. Coon*, 40 Cal. 33; *Barney v. Keokuk*, 94 U. S. 336; *Shively v. Parker*, 9 Oreg. 504.

may deem most advantageous to the public. This right has been uniformly reserved by solemn compact upon the admission of new states, and has always been recognized and scrupulously respected by the states within which large portions of the public lands have been comprised, and within which much of these lands is still remaining.

The lands belonging to the state are distinguishable into two general classes: (1) Those which it owns by virtue of grants from the United States. (2) Those which it owns by reason of its sovereignty. The states entering the Union as sovereign proprietors claim original and, in some instances, ultimate title in all their lands, while the class of lands, in states formed from the territories, belonging to the state by reason of its sovereignty, includes only the shores of the sea, and of its bays and inlets. Such lands, called "marsh" or "tide" lands, are such as are covered and uncovered by the ebb and flow of the tide, but are susceptible of reclamation so as to be made valuable for agricultural and other purposes.¹ This doctrine of title by sovereignty also prevails in many of the inland states, and is applied to the navigable streams upon the borders and within the boundaries of the state.² The state can make no disposition of the lands it thus holds by virtue of its sovereignty prejudicial to the rights of the public to use them for navigation and fishery, but it may dispose of them for the purpose of promoting the interests of navigation, or of reclaiming them from the sea, where it can be done without prejudice to the public right of navigation.³ The title to lands under tide waters within the realm of England was by the common law deemed to be vested in the king as a public trust to subserve and protect the public right to use them as common highways

¹ *People v. Morrill*, 26 Cal. 336; *Ward v. Mulford*, 32 Cal. 365; *1* *Musser v. Hershey*, 42 Iowa. 356; *Barney v. Keokuk*, 94 U. S. 324; *Benson v. Morrow*, 61 Mo. 345; *Coburn v. Ames*, 52 Cal. 385; *Hinman v. Warren*, 6 Oreg. 408; *Pol-*

lard v. Hagan, 3 How. (U. S.) 212. ³ *Ward v. Mulford*, 32 Cal. 365.

for commerce, trade and intercourse. The king, by virtue of his proprietary interest, could grant the soil so that it should become private property, but his grant was subject to the paramount right of public use, which he could neither destroy nor abridge. The laws of most nations have sedulously guarded the public use of navigable waters within their limits against infringement, subjecting same only to such regulation by the state, in the interest of the public, as is deemed consistent with the preservation of the public right.¹ The title to lands under tide waters in this country, which before the Revolution was vested in the king, became, upon separation of the colonies, vested in the states within which they were situated. The people of the state, in their right of sovereignty, succeeded to the royal title, and through the legislature may exercise the same powers which previously to the Revolution could have been exercised by the king alone, or by him in conjunction with parliament, subject only to those restrictions which have been imposed by the constitution of the state and of the United States.²

Sources of original title.—While the proposition that the government is the source or fountain of individual title admits neither of question nor argument, yet it must be apparent, in the light of history, that even the government, state, federal or pre-national, must itself in some manner have acquired a right which had no existence prior to the year 1492. That to justify its claim of original ownership it must, in some manner sanctioned by law or the usage of nations, have become invested with the disposing power it has assumed to exercise. Hence we find that in the economy of nations, with reference to territorial acquisition, there are four methods recognized whereby a sovereign title is created. These methods are classed as *occupancy*, *discovery*, *conquest* and *cession*, and through some one of these various methods

¹ *People v. Ferry Co.*, 68 N. Y. 71. ² *Lansing v. Smith*, 4 Wend. See *Stewart v. Fitch*, 30 N. J. L. (N. Y.) 9; *Commonwealth v. Roxbury*, 9 Gray (Mass.), 492; *Storer v. Freeman*, 6 Mass. 435.

has the title to all of the national domain of the United States been acquired.

Occupancy.— That immemorial occupancy confers upon the occupant a valid title to the land actually occupied is generally conceded by the laws of all civilized nations. Hence it is said the American Indian holds the right to use and enjoy his lands by virtue of prior occupancy. But though the Indian title by occupancy is respected by the courts until legitimately extinguished, yet such title does not extend to property in the soil, nor can it form the basis of any individual rights by reason of transfer from the aboriginal occupant. In the exercise of its sovereign prerogatives the government has ever reserved the exclusive right to extinguish this title by purchase or conquest.¹

The only part of the United States where this title can be said to form the basis of a national right is the northwestern Pacific states, and even here the title may be considered, in some respects, as resting in discovery through the early explorations of Lewis and Clark, while some writers contend that this territory was part of the Louisiana purchase, and

¹Johnson v. McIntosh, 8 Wheat. 543; Fletcher v. Peck, 6 Cranch, 87. Immediately after the inauguration of President Washington, he laid before congress a report from the secretary of war, acknowledging the Indian right of occupancy, and recognizing the principle of acquiring their claims by purchase for specific consideration according to the "practice of the late English colonies and government in purchasing the Indian claims," and the rule in that respect laid down in the proclamation of October 7, 1763, by the king of Great Britain, interdicting purchases of land by private individuals from Indians, and declaring that "if at

any time any of the said Indians should be inclined to dispose of said lands," the same "shall be purchased only" for the crown, the ultimate dominion and sovereignty being held to reside in the discoverer colonizing upon the continent. In accordance with this principle, beginning with the treaty of 1795, at Greenville, the Indian title of occupancy has been gradually extinguished by the United States in all of the states east of the Mississippi, and in nearly all of the states and territories west of same, leaving, in some cases, remnants of tribes, who have been invested by congress with allodial titles.

hence that the title is derived through cession. To some extent also the titles of the colonial states rest on occupancy; for while such titles are generally referred to the early charters, yet, in many instances, the descriptions in the charters were very vague, indefinite and uncertain, and the royal titles, to which the states succeeded, were acquired through discovery, occupancy and conquest.

In the natural and proper meaning of the term as first above given, however, no part of the national domain can be said to rest on occupancy, or a time-immemorial possession. The Indian title by occupancy — and this is the only title that can really be classed under this head — is invariably extinguished before the lands are disposed of, and the fact of such extinguishment leaves the title of the government to rest on either conquest or cession.

Discovery.— It is fully in consonance with law and reason that he who discovers, or first finds, that which before was unknown, or to which there are no other or prior claimants, should be entitled to such ownership therein as the exigencies of the case will admit. In the case of an uninhabited country this rule would apply, and a valid title by discovery would vest in the nation whose citizens or subjects first occupied its soil.¹ The original European owners of America based their title on prior discovery; yet, with the exception of isolated tracts, all of the lands in the western hemisphere were, at the time of the landing of the first explorer, in the full and lawful possession of native races.

For the purposes of juridical inquiry and determination, however, the nations which first colonized the new world are held to have acquired a title to the parts actually or constructively occupied or claimed by them, by virtue of discovery and settlement.² Where the original claimant was unable to hold its possessions by force of arms, they

¹ See *Guano Co. v. Guano Co.*, 44 (U. S.) 543; *Martin v. Waddell*, 16 Barb. (N. Y.) 27. Pet. (U. S.) 367.

² *Johnson v. McIntosh*, 8 Wheat.

passed under a new dominion, which held same by conquest, or if such original claimant sold or transferred its possessions by treaty or grant, the title in the successor became one of cession.

Conquest.—The title to a very large portion of the lands embraced within the territorial limits of the United States originated in conquest. Title by conquest is acquired and maintained by force—a principle to which all the fundamental ideas of law are violently opposed. But whatever the private and speculative opinions of individuals may be respecting a claim so derived, it is yet a title which the courts of the conqueror cannot deny; and however extravagant the pretension of converting the discovery of an inhabited country into a conquest may appear, yet if the principle has been asserted in the first instance and afterwards sustained; if a country has been acquired and held under it; if the property rights of the great mass of the community originates in it, then it becomes the law of the land, and cannot be questioned.¹

Cession.—The immediate title to the great bulk of the lands of the United States is derived through cession, or grants from the various governments which, prior to such cession, claimed sovereignty and proprietary rights therein. It is true these rights were founded on occupancy, discovery, or conquest; but for the purposes of an orderly derangement of title courts do not look beyond the deed of cession or inquire into the ceder's right to convey.

For all practical purposes, therefore, the state or federal governments are to be regarded as the sources of title, and their deeds of alienation, whether by grant or confirmation, considered the original root of title; yet, as we have seen, the titles thus granted or confirmed are in turn deducible

¹Johnson v. McIntosh, 8 Wheat. (U. S.) 543; Fletcher v. Peck, 6 Cranch (U. S.), 87.

from the rights and powers once asserted by the crowns of Europe, and are but a continuation, in lawful succession, of the possession of the original proprietors.¹

ART. II. DERIVATIVE TITLE.

Generally considered.—At a very early period of legal development the elementary writers made an arbitrary division of the methods of acquiring title to real property by reducing same to two general forms. This division, sanctioned by long usage and judicial acquiescence, has been adopted by courts and jurists in this country, notwithstanding its admitted unphilosophical character, and the title to all lands held in private ownership, as well as lands owned by the state or any of its municipal agencies under a derivative title, is referable to one or the other of these methods. They are termed, respectively:

1. *Descent*, or that title which accrues through the death of one person to some other person nominated by law to receive such decedent's estate; and

2. *Purchase*, which comprehends every form of devolution of title except by descent.

A more philosophic, and at the same time strictly accurate, division might be made if we were to say title to land is de-

¹ The title to our national domain comes, first, by discovery by the Cabots; second, by discoveries and colonization under grants, authorizations and charters from England, Holland, France, Sweden and Spain, and treaties and conventions thereafter; third, by Revolution in 1776, and confirmation through and by the definitive treaty of peace at Paris with Great Britain, September 3, 1783, whereby the Crown of Great Britain recognized the independence of the United States; fourth, by purchase from France of the province of Louisiana, April 30, 1803; fifth, by purchase from Spain of the East and West Floridas, February 22, 1819; sixth, by annexation of the republic of Texas, December 29, 1845; seventh, by the treaty of Guadalupe Hidalgo, February 2, 1848; eighth, by purchase from the republic of Mexico (the Gadsden purchase) of the Mesilla Valley, December 30, 1853; ninth, by purchase from the empire of Russia of Alaska, March 30, 1867. See Donaldson's Public Domain.

rived (1) by the act or operation of law, and (2) by the act or agreement of the parties; and every lawful method of acquisition could, with scientific exactness, be properly classed under one or the other of these heads. As it is, there is some confusion in the arrangement and development of the subject of title which is unavoidable under the present division. The strong conservative feeling which hesitates to introduce a new terminology has permitted many inconvenient and imperfect classifications to remain in our law, and of these the primary division of derivative title is a conspicuous example.

SEC. 1. TITLE BY DESCENT.

Nature, operation and incidents.—*Hereditary succession* or *descent* is the title whereby one person, upon the death of another, succeeds to or acquires the estate of the latter by operation of law, the estate so derived being called an *inheritance*. The person from whom such estate is derived is called the *ancestor*,¹ and the person who succeeds to same is technically termed the *heir*. Heirs are said to take *per capita*, that is, direct, or in their own right, they standing in equal degree and receiving equal shares; or *per stirpes*, or by right of representation, as where the descendants of a deceased heir take the same share or right in the estate of another person that their ancestor would have taken if living. Though of universal observance, inheritance is not a natural right, but purely statutory, and therefore arbitrary, absolute and unconditional.

For practical purposes descent is regarded as a new title springing from the death of the ancestor, and when asserted must be so proved; yet in reality it is but a continuation of the ancestor's title, which the law casts upon the heir at the

¹The term "ancestor" in common parlance is usually understood to mean a progenitor; but when used with reference to the descent of real property, it will be held to embrace all persons, collaterals as well as lineals, through whom an inheritance is derived. See *Wheeler v. Clutterbuck*, 52 N. Y. 67.

moment of the ancestor's death.¹ The heir is regarded in law as a legal appointee to receive the title, and this appointment he can neither disclaim nor avoid.² Whenever the death of any person is shown, until rebutted the presumption is that he died intestate,³ and that his heirs take his estate under the laws of descent.⁴

All rights or interests, legal or equitable, vested or contingent, to which the intestate was in any manner entitled at his decease, except estates which come within the definition of chattels real, are valid subjects of descent, and pass to the heir.⁵

The title to the land of an intestate vests immediately in the heir, who forthwith holds same in his own right, subject, however, to the payment of the debts of the ancestor, or the fulfillment of his covenants. Hence, the estate is defeasible at the time, and becomes absolute only after the debts are extinguished.⁶ But though the rights of the heir may afterward be divested by decree of the probate court and sale by the administrator, yet until such contingency he is the owner, and entitled to all rents, profits or other beneficial incidents flowing from the land.⁷ Subject to the lien of the creditors, he may make any disposition of the land he may choose, and after due probate and administration, together with an extinguishment of the debts, the title becomes perfect in him or his assigns.⁸

¹ Marshall v. Rose, 86 Ill. 374.

² Wms. Real Prop. 75; 2 Black. Com. 201; 3 Wash. Real Prop. 6; Moore v. Chandler, 59 Ill. 466.

³ The word "intestate" properly signifies a person who died without leaving a will; but where it is used with respect to particular property, it signifies a person who died without effectually disposing of that property by will, whether he left a will or not.

⁴ Lyon v. Kain, 36 Ill. 362. In

all cases of intestacy the *lex rei sitæ* governs the descent. Lingen v. Lingen, 45 Ala. 410.

⁵ The statute usually defines the subjects of inheritance, but the above is the substance of the statute as generally enacted.

⁶ Walbridge v. Day, 31 Ill. 379; Chubb v. Johnson, 11 Tex. 469.

⁷ Foltz v. Prouse, 17 Ill. 487; Gibson v. Farley, 16 Mass. 280.

⁸ Vansyckle v. Richardson, 13 Ill. 171; Austin v. Bailey, 37 Vt. 19.

An heir is under no legal liability to discharge the debts of his ancestor from whom he takes real estate, except where the personal estate of such ancestor is insufficient to pay same,¹ and creditors, in the first instance, must resort to the personal representatives, before seeking satisfaction of the heirs.² After having accepted the succession, they become personally liable for the debts of the ancestor,³ but only to the extent of what descends to them from such ancestor.⁴

So, too, heirs are not bound by the covenants of their ancestor, further than the real estate descended to them, and the amount of their distributive shares of the ancestor's personal estate.⁵

Title by descent accrues to the heir by virtue of some legal relation which he sustained to the ancestor, and such title may be derived:

(1) Through consanguinity.

(2) Through affinity.

(3) Through adoption.

The law which governs the order of succession through these various channels is known as the "rules of descent." The "canons of inheritance" of the common law⁶ have no

¹ McLean v. McBean, 74 Ill. 134; Woodfin v. Anderson, 2 Tenn. Ch. 331. Though customary, it is not accurate to say that lands descending to heirs are charged with the debts of the ancestor. The lands are liable only to be charged with the payment of debts upon a deficiency of personal assets; and this right may be lost by delay. Bishop v. O'Connor, 69 Ill. 431.

² Mix v. French, 10 Heisk. (Tenn.) 377.

³ Succession of Bougere, 28 La. Ann. 743. The debts chargeable upon lands descended are those contracted by the decedent owner, not those incurred by his repre-

sentatives in the course of administration. Allen v. Poole, 54 Miss. 323; Porterfield v. Taliaferro, 9 Lea (Tenn.), 242.

⁴ Payson v. Haddock, 8 Biss. (Ct.) 293; Williams v. Ewing, 31 Ark. 239; Branger v. Lucy, 83 Ill. 91.

⁵ Holden v. Mount, 2 Marsh. (Ky.) 189; Miller v. Bledsoe, 61 Mo. 96.

⁶ There were seven common-law canons of descent to the effect: 1, that inheritance should always descend lineally, and never ascend lineally; 2, that males are always preferred to females; 3, of two or more males of equal degree, the eldest only should inherit, but females altogether; 4, that lineal

application in the United States, but rules have been established in every state which regulate the line of succession and declare who, under certain conditions, shall be the heir. These laws, while preserving a substantial agreement in their general outlines, differ materially in detail, and it is doubtful if any two of them are exactly alike.

But while there is a wide diversity of detail in the statutes of the different states, yet it may be stated generally that five well-defined principles relative to the succession are discernible. The descent in accordance with these principles is as follows: Real estate of an intestate descends (1) to his lineal descendants, except where a surviving consort is allowed to participate; (2) to his father, varied in some cases by a participation of brothers and sisters; (3) to his mother, varied as before by collateral participation; (4) to his collateral relatives; and (5) to the state by escheat. These five elementary principles are covered by a network of conditions and provisos, differing more or less in every state, and the application of these conditions governs the descent, and directs it into some one of the channels above enumerated. In all cases not provided for by statute, the inheritance descends according to the course of the common law.

(1) *Title by Descent through Consanguinity.*

Definition and nature.—The relation subsisting among all the different persons descending from the same stock or common ancestor is called *consanguinity*, and is the medium through which, in the descent of real property, the several

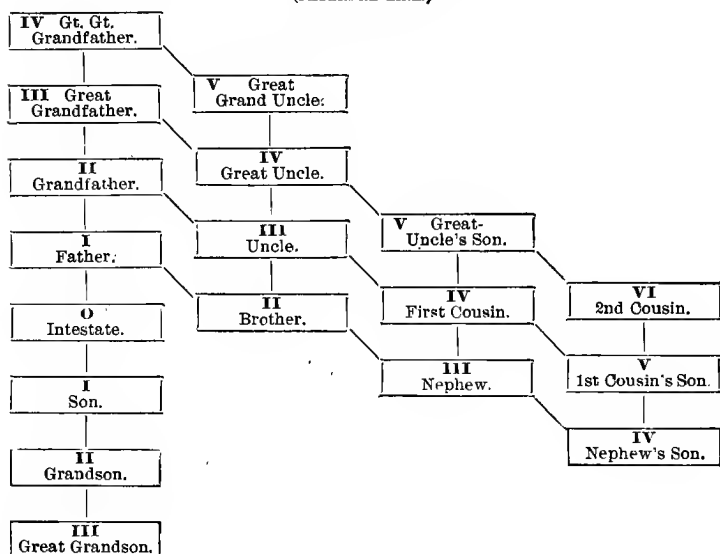
descendants *in infinitum*, of any person deceased, should represent their ancestor; 5, on failure of lineal descendants, the inheritance should descend to the collateral relations, being of the blood of the first purchaser, subject to the three preceding rules; 6, the collateral heir of the person last seized must be his next collateral kinsman of the whole blood; 7, in collateral inheritances, the male stock should be preferred to the female, unless where the lands had, in fact, descended from a female. 2 Black. Com. 208, 234.

degrees of kindred are computed and deduced. Consanguinity is *lineal* or *collateral*; the former being the relation which exists among persons where one is descended from the other, as between father and son, in the direct line of descent; the latter is the relation subsisting between persons descended from the common ancestor, but not from each other, as between brother and sister. There are two methods of computing the degrees of consanguinity, known respectively as the civil and common-law methods, the latter being also the same as the canon law. The rule of the civil law is generally used in this country, and is preferable, for that it points out the actual degree of kindred in all cases. This mode of computation begins with the intestate, and ascends from him to the common ancestor, and descends from such ancestor to the next heir, reckoning a degree for each person, both ascending and descending, and the degrees they stand from each other is the degree in which they stand related. According to this rule of computation, it will be seen the father of the intestate stands in the first degree, his brother in the second, his nephew in the third, etc. By the common-law method of computation, different relations may stand in the same degree, and the degrees are counted the same whether lineal or collateral. The mode of the common and canon law is to discover the common ancestor, and beginning with him to reckon downwards, and the degree the two persons, or the more remote of them, is distant from the ancestor, is the degree of kindred subsisting between them. By this means the father and brother of the intestate, or person proposed, stand in the same degree. By the civil law the father stands in the first degree, the brother in the second. So by the common law the first cousin stands in the second degree; by the civil law he would stand in the fourth. The line of ancestry is classed as *ascending* or *descending*, taking the person proposed as the unit, and is further classified as *paternal* or *maternal*, according as the examination may lead through the father or the mother.

The following diagram will serve to illustrate the degrees of consanguinity according to the civil law:

DEGREES OF CONSANGUINITY ACCORDING TO THE CIVIL LAW.

(PATERNAL LINE.)



The right of succession.—Title by inheritance accrues only to the issue of lawful wedlock,¹ and can be asserted only by those persons who can bring themselves within the line of succession provided by the statute. To successfully assert title, therefore, it is necessary for the heir to show: (1) the death of the ancestor, and lawful seizin in him of the subject-matter of the title at the time of such decease; (2) the marriage of his parents; and (3) proof of his legitimacy. These three points satisfactorily established, the law will invest him with title to such portion of the ancestor's estate as, under the statute, he is entitled to take. All the presumptions of law, however, are in favor of legitimate birth,² and an illegitimate child is in all cases considered as

¹ Blacklaws v. Milne, 82 Ill. 505.² Fox v. Burke, 31 Minn. 319.

the heir of his mother.¹ Posthumous children take in all respects as though they had been born in the life-time of the intestate.²

To prove heirship in a collateral line, the party must show the descent of himself and the person last seized from some common ancestor, and the extinction of all those lines of descent which would claim before him.³ It was formerly the rule, in collateral inheritances, that kindred of the half-blood could not inherit from each other; but this rule has long been abrogated, and kindred of the half-blood now inherit equally with those of the whole blood in the same degree, except where the inheritance is ancestral.

Ancestral estates — Half-blood.— A marked provision may be observed in the statutes of descent of all the states in relation to ancestral estates, and the exclusion of all persons who do not partake of the blood of such ancestor. The clause in question provides, in substance, that in case an inheritance comes to an intestate by descent, devise or gift of one of his ancestors, all those not of the blood of such ancestor shall be excluded from such inheritance; and the rule observed by the courts is general that only persons of ancestral blood can inherit ancestral estates.⁴ The current of later decisions, however, is uniform in declaring that the rule has reference to the immediate ancestor from whom the intestate received the inheritance, and not from a remote ancestor who was the original source of title.⁵

The right of representation.— This is the right of the lineal descendants to take the portion which their ancestor would have taken, and is called inheritance *per stirpes*. It is a statutory right, and, by reason of the diversity of the statutes of the different states, no positive rule can be stated.

¹ Miller v. Williams, 66 Ill. 92.

This matter is statutory, however.

⁴ Campbell v. Ware, 27 Ark. 65.

⁵ Buckingham v. Jacques, 37

² Morrow v. Scott, 7 Ga. 535; Conn. 402; Curran v. Taylor, 19 Smith v. McConnell, 17 Ill. 135.

Ohio, 36; Cramer's Appeal, 43 Wis.

³ Emmerson v. White, 29 N. H. 167.

Generally, if one of several children shall have died before the ancestor,¹ the heirs of such child will take the portion which would have descended to it if it had survived the ancestor,¹ and the same rules apply in determining who are the heirs of such child as in any other case of descent. In a few states, where an intestate leaves grandchildren only, they all take *per capita*, or in their own right;² but as a rule of more general observance, the lineal descendants represent only their ancestor.³

Preferences.— By the common-law canons of descent males were preferred before females, the eldest male taking in preference to others of equal degree, and females equally, while in collateral inheritances the male stocks were always preferred to the female, except where, in fact, the lands had descended from a female. This has all been abolished by the statutes of descent, which provide in all cases for equal participation among the members of a class; and the right of primogeniture, if it ever existed in this country, is now unknown.

Aliens.— There is a mass of curious and obsolete learning in the books relative to persons capable of succeeding to an inheritance, for the law formerly guarded the landed estates of the country with jealous care, and ruthlessly excluded from a succession thereto all persons who owed fealty to another sovereign. Inheritance was long confined to citizens of the United States, and aliens were expressly declared incapable of taking lands by descent or other mere operation of law; and because an alien could have no inheritable blood through which title could be deduced, a citizen was precluded

¹ Dodge v. Beeler, 12 Kan. 524; application of that rule descendants of a person deceased *in infinitum* represented their ancestor, Crump v. Faucett, 70 N. C. 345.

² Cox v. Cox, 44 Ind. 368; Eshleman's Appeal, 74 Pa. St. 42. Compare Harris' Estate, 74 Pa. St. 452.

³ This is somewhat in accordance with the fourth canon of inheritance at common law, only by the and only when the representation failed were the lineal descendants of the intestate next of kin permitted to come in.

from asserting a title so derived. In case of the death of an alien owning lands, or of a citizen without other than alien heirs, the lands of such persons escheated to the state. In some localities the common-law disabilities of alienage are still retained in a modified form,¹ but in a majority of the states where the doctrine formerly prevailed it has been swept away by the liberal policy of later years, and in many of the newer states it never had a recognition. In such states, for all practical purposes, so far as respects the acquisition and descent of land, the alien and the citizen stand upon an equal footing.² In all cases treaties of the United States with foreign nations, regarding aliens, supersede or suspend the operation of restrictive statutes, as to the citizens or subjects of such nations, so far as the two may conflict.³

Coparceners.—Persons to whom an estate of inheritance descends jointly, and by whom it is held as an entire estate, are called *coparceners*. Formerly in England the term included all persons, and such is its legal signification in America, but its present use in England is confined to females. The distinction between coparcenary and tenancy in common is virtually abolished in the United States, and the general rules relative to tenants in common have the same application whether the common property be derived by descent or by purchase.

(2) *Title by Descent through Affinity.*

Defined and distinguished.—The relationship or connection arising in consequence of marriage, which exists between each of the married persons and their kindred, is termed *affinity*, and is distinguished from consanguinity, which is

¹ See *Wunderle v. Wunderle*, 144 Ill. 40; *Beavan v. Went*, 155 Ill. 592. ³ *Schultze v. Schultze*, 144 Ill. 290; *Hauenstein v. Lynham*, 100 U. S. 483; *Jele v. Lemberger*, Ill. Sup.

² See *McConville v. Howell*, 17 Ct., Oct., 1896. *Fed. Rep.* 104; *Parish v. Ward*, 28 Barb. (N. Y.) 328.

used to denote the ties of blood. At common law the relationship of affinity is not sufficient to obtain legal succession or inheritance, but by statute, in most of the states, the surviving husband or wife has been endowed with inheritable qualities, and may take as heirs of each other according to the prescribed rules of descent.

It is true that husbands and wives are in no sense of the word "next of kin" to the other; but, inasmuch as heirship is peculiarly a creation of the statute, it is fully within the sovereign power of the state to make a surviving husband or wife, as well as a child, an heir, and this has been directly or indirectly accomplished in a number of localities.¹ In the sense that an heir at law is simply one who succeeds to the estate of a deceased person, the wife is an heir of her deceased husband.²

In default of lineal kindred in the descending line, a widow is now generally permitted to participate in the inheritance, and when so permitted she is strictly an heir. The right of dower has also been radically changed in a few states, so that instead of the use, during life, of a portion of the husband's estate, the fee to a specific quantity vests absolutely in the widow upon his death; and though it will require no small amount of astute reasoning to discover wherein such procedure does not constitute a descent, yet the courts of such states, in view of the fact that the statute declares that she shall be "entitled," etc., have decided that the widow does not take by descent, as an heir, but by virtue of her marriage relation, as a widow.³

(3) *Title by Descent through Adoption.*

Defined and distinguished.—Adoption is a juridical act creating between two persons certain relations, purely civil, of paternity and filiation. The legal adoption by one person

¹ May v. Fletcher, 40 Ind. 577; Dodge v. Beeler, 12 Kan. 524; Ringhouse v. Keever, 49 Ill. 470.

² McKinney v. Stewart, 5 Kan. 384; Steel v. Kurtz, 28 Ohio St. 192.

³ Brannon v. May, 43 Ind. 93.

of the offspring of another, giving him the status of a child and heir of the parent by adoption, was unknown to the common law, although long recognized by the civil, and is of comparatively recent date in the United States. The act of adoption is the creation of an artificial relation, made in conformity with and regulated by positive statute, and in the light of which the new rights and obligations thus derived are to be solely construed.¹ There is a lack of uniformity in the statutes enacted by the states, but in the main they agree in conferring on the person so adopted the rights of inheritance and succession, and other legal consequences and incidents of the natural relation of parent and child, the same as if such child had been born in lawful wedlock of such parents by adoption, but, as a rule, restrict such child from taking property expressly limited to the body or bodies of the parents by adoption, and in some instances from taking from the lineal or collateral kindred of the parents by right of representation. The right of inheritance thus secured is generally restricted to the adopted parent, and precludes an inheritance from the actual children of such adopted parent;² while the right of inheritance by the adoptive parents from the child is confined to such property as he had received through them, and, as a rule, they are expressly prohibited from inheriting any property which the child received from his own kindred by blood.³ As against the adopted child, the statute should be strictly construed, being in derogation of the general law of inheritance, which is founded on blood relationship, and is a rule of succession according to nature, which has prevailed from time immemorial.

The rights of inheritance acquired by an adopted child under the laws of a particular state are recognized and up-

¹ Keegan v. Geraghty, 101 Ill. 26;
Long v. Hewitt, 44 Iowa, 363; Tyler
v. Reynolds, 53 Iowa, 146.

² Barnhizer v. Ferrell, 47 Ind. 335;
Keegan v. Geraghty, 101 Ill. 26.

³ Keegan v. Geraghty, 101 Ill. 26.
See, also, Reinders v. Kappelmann,
68 Mo. 482.

held in every other state, so far as they are not inconsistent with its own laws and policy;¹ but in the absence of statutory directions, the general rules of descent must govern as in other cases.² Where the rights of an adoptive heir acquired in one state are recognized in another, his inheritable capacity must be measured by the laws of the state where the land is situate, and not by those of his late ancestor's domicile, or the state conferring inheritable blood.

The right of succession.—Where land is claimed by descent and the heir is such by adoption and not by blood, before such title can be asserted over other claimants the right of succession must be established in some legal manner. This would be accomplished by the decree of adoption. The right of adoption, as previously stated, is not of common-law origin, but seems to have been borrowed from the civil law, and in every instance is purely statutory. It is necessary, therefore, that the facts essential to the exercise of this special jurisdiction should be shown by the record; and to give a decree of adoption any force or effect the court pronouncing same must, as a rule, have acquired jurisdiction (1) over the persons seeking to adopt the child; (2) over the child, and (3) over the parents of such child.³ In other words, the statute must in all cases be complied with;⁴ its terms and conditions must be fulfilled; and if the specified requisites⁵ are not performed, then the act is incomplete and the child cannot inherit from the parent by adoption.⁶ Where the statute provides specifically the means whereby one sustaining no blood relation to an intestate may inherit his property, the rights of inheritance must be acquired in that manner, and can be acquired in no other way.⁷

¹ Ross v. Ross, 129 Mass. 243.

² Reinders v. Kappelman, 68 Mo. 482.

³ Furgeson v. Jones, 17 Oreg. 204.

⁴ Tyler v. Reynolds, 53 Iowa, 146; Keegan v. Geraghty, 101 Ill. 26.

⁵ Usually the consent of the parents or surviving parent of the

child is required, and if the child is over the age of consent, its own consent as well. Where these requisites are specified they are vital.

⁶ Luppie v. Winans, 37 N. J. Eq. 245; Foster v. Waterman, 124 Mass. 592.

⁷ Shearer v. Weaver, 56 Iowa, 578.

SEC. 2. TITLE BY PURCHASE.

Defined and classified.—As previously remarked, *purchase* is a generic term which includes every legal method of acquiring an estate except by inheritance. Neither law-writers nor courts ever seem to have ventured upon a more extended definition, if indeed one can be framed, and that just given has come down unchanged from Blackstone, who in turn borrowed it from earlier writers.¹ Two general methods of acquiring title by purchase are recognized, and these are known respectively as:

1. Title by act of the parties.
2. Title by operation of law.

This primary division or classification is susceptible of a number of divisions and subdivisions, defining particularly the channels through which title flows, and which will be fully illustrated in the succeeding paragraphs.

1. *Title through Act of the Parties.*

Where title accrues through the act or agreement of the parties, the operative instrument of conveyance becomes effective either (1) in the life-time of the grantor, when the title is said to be by *grant* or *deed*, or (2) after his death, in which event the title is said to be by *devise*. It is through this general division that ownership of the great bulk of all of the lands in the country is derived; and all deeds or instruments of conveyance of whatever kind or nature, whether made by persons *sui juris*, that is, in their own right, or by agents, or fiduciaries, are known as *muniments of title*, the legal features of which will be considered when we shall come to treat of conveyances.

(1) *Title through Act of the Parties by way of Grant.*

Generally considered.—According to the old law a grant applied only to those things which, by reason of their intangible nature, were incapable of actual delivery or livery

¹ Coke, Litt. 18b; 2 Black. Com. 241; 3 Wash. Real Prop. 4.

of seizin. Hence it was in respect to incorporeal property only, that title was deduced in this manner. But deeds having long superseded the ancient livery, all property is now the subject of grant.¹ Title by grant is deduced either through (a) *public grant* or (b) *private grant*, the former being the act or deed of the sovereign power, the latter the exercise of individual volition. Partaking of the general nature of grant is a further form of title known as (c) *confirmation*, applicable either to public or private acts of divesture.

(a) *Public Grant.*

Patent.—The original divesture of title by the government, either state or national, may be effected in a variety of ways, either of which will be sufficient for the purpose intended. The usual method is what is known as a *patent*, or a deed issued in conformity to prescribed legal formalities. A patent is a complete appropriation of the land it describes,² and passes to the patentee all the interest of the United States, whatever it may be, in everything connected with the soil, or forming any portion of its bed, or fixed to its surface; in short, in everything embraced within the term "land."³ It is conclusive evidence of the right of the patentee to the land described therein, not only as between himself and the government, but as between himself and a

¹ 4 Kent, Com. 494; Wms. Real Prop. 147; Wash. Real Prop. 181.

² Stringer's Lessee v. Young, 3 Pet. 320.

³ Fremont v. Flower, 17 Cal. 199. According to the common law of England, mines of gold and silver were the exclusive property of the crown, and did not pass in a grant of the king under a general designation of lands or mines. It has sometimes been asserted that this prerogative right passed to or was inherent in the states, but this is an error. The *jura regalia* which

pertained to the king at common law comprehended not only those rights which relate to the political character and authority of the sovereign, but also those which are incidental to his regal dignity, and may be severed at pleasure from the crown and vested in the subject. It is only to the rights of the first class that the states by virtue of their sovereignty are entitled, and mines of the precious metals belong to the second class. Moore v. Snow, 17 Cal. 199.

third person who has not a superior title from a source of paramount proprietorship.¹ When issued to a conferee of a foreign grant, it operates like the deed of any other grantor, and passes only such interest as the government possessed, the deed taking effect by relation from the initiation of the series of proceedings for confirmation, and of which it forms the last act.²

The government of the United States has a perfect title to the public lands and an absolute and unqualified right of primary disposal. Neither state nor territorial legislation can in any manner modify or affect this right; nor can such legislation deprive the grantees of the United States of the possession and enjoyment of the property granted, by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition.³ Whether the title to a portion of the public lands has passed from the United States depends exclusively upon the laws of the United States; when it has passed, it then becomes subject to state laws.⁴ These statements acquire additional importance from the fact that in a majority of the western states the entry has been recognized as the basis of a legal title, and in actions of ejectment has frequently been received as such; but in the federal courts the patent is held to be the foundation of title at law, and neither party can bring his entry before the court.⁵ A purchaser from one holding under a patent is not bound to look behind the patent to learn if it was properly issued to the one entitled to it,⁶ for the instrument is in itself presumptive evidence that all prior proceedings are legal;⁷ but every purchaser is presumed to have notice of any defect of title apparent upon its face,⁸ and is charge-

¹ *Waterman v. Smith*, 13 Cal. 373.

² *Yount v. Howell*, 14 Cal. 465.

³ *Union Mill, etc. Co. v. Ferriss*,
2 *Sawyer*, 176; *Gibson v. Chouteau*,
13 Wall. 92.

⁴ *Wilcox v. Jackson*, 13 Pet. 498.

⁵ *McArthur v. Browder*, 4 Wheat.
488; *Fenn v. Holmes*, 21 How. 481.

⁶ *Schnee v. Schnee*, 23 Wis. 377.

⁷ *Barry v. Gamble*, 8 Mo. 88; *Winter v. Crommelin*, 18 How. 87;

Stringer v. Young, 3 Pet. 320.

⁸ *Bell v. Duncan*, 11 Ohio, 192.

able with notice of whatever the patent recites.¹ A patent issued to a fictitious person is a nullity,² but the heirs of a deceased person will take a valid title to the land so conveyed to a deceased ancestor.³

In the colonial states and the territory claimed by them, as well as in the state of Texas, the original and paramount source of title is the state. In all the states formed from national territory, except as the sovereign prerogative over submerged land has been asserted, the patent from the state is only a mesne conveyance of an older and pre-existent title, depending for its validity upon the preliminary steps by which the state acquired ownership to the soil. In tide-water states, notably Alabama, California and Oregon, where the doctrine of original title in marsh and submerged lands, by virtue of sovereignty, has been strongly asserted, a state patent or grant may in some cases form the foundation of an unassailable title; but in the interior, as well as in states bordering on the Great Lakes, where no perceptible tide is found, the state, while exercising dominion over its water-ways, has usually conceded the ownership in the soil covered thereby to the adjacent riparian proprietor, who would hold, whatever might be the mesne conveyances, from the United States in virtue of the original divesture by patent, grant, or otherwise.

Legislative act.—The United States or a state may make a grant of land by a law as effectually as by a patent issued in pursuance of a law. In the former case it is the direct act of the government through the legislature, in the latter it is a ministerial act under the direction of the legislature.

A confirmation by law of a claim of title in public lands is to all intents and purposes a grant of such lands,⁴ and,

¹ *United States v. Land Grant* 554; *Dean v. Bittner*, 77 Mo. 101; *Co.*, 21 Fed. Rep. 19. *Hall v. Jarvis*, 65 Ill. 302; *Langdeau*

² *Thomas v. Wyatt*, 25 Mo. 24. *v. Hanes*, 21 Wall. 521; *Strother v.*

³ *Galloway v. Finley*, 12 Pet. (U. S.) 26. *Lucas*, 12 Pet. 411; *Field v. Seabury*, 19 How. 323.

⁴ *Challefoux v. Ducharme*, 4 Wis.

where one is in possession of land, a resolve of the legislature, releasing them to him, passes a title without any further act, except performance of the conditions, if any.¹ An act of congress, containing provisions clearly indicating an intention to pass the fee unconditionally and absolutely, operates *ipso facto* to vest the title in the grantee;² but if the grant be coupled with a condition, it will not operate to vest the title until such condition has been complied with.³ An act of congress granting land to one person is higher evidence of title than a patent of the same land subsequently issued by the officers of government to another person, and cannot be defeated by such subsequent patent.⁴ Thus, titles derived from the state to lands selected under the "swamp grant" will take precedence over patents from the United States issued subsequent to the date of the granting act.⁵

Legislative grants and confirmations are usually followed by patent, the issuance of which is specially provided for in the granting act; yet the patent in most cases adds nothing to the force of the grant, but is merely confirmatory of what has preceded. If a claim be made to land with defined boundaries, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title. If the claim be to quantity, and not to a specific tract capable of identification, a segregation by survey will be required, and the confirmation will then immediately attach the title to the land segregated.⁶ Analogous to the rule which obtains in case of patents, where there are two confirmations or grants of the same land the elder must prevail and will give the better title. The government, like an individual, has no power to withdraw or

¹ Mayo v. Libby, 12 Mass. 339;
Ryan v. Carter, 93 U. S. 78.

² Ballance v. Tesson, 12 Ill. 327;
Grignon's Lessee v. Astor, 2 How.
319.

³ Thompson v. Prince, 67 Ill. 281.

⁴ Dousman v. Hooe, 3 Wis. 466;
Megerle v. Ashe, 27 Cal. 322.

⁵ Ruigo v. Rotau, 29 Ark. 56;
Keller v. Brickley, 78 Ill. 133; Rail-
road Co. v. Brown, 40 Iowa, 333;
Daniel v. Purvis, 50 Miss. 261.

⁶ Langdeau v. Hanes, 21 Wall.
(U. S.) 521; Swann v. Lindsey, 70
Ala. 507; Dean v. Bittner, 77 Mo.
101.

annul its grant; the first, if lawful, must stand, and the second cannot operate as a conveyance, for the reason that the grantor, when it was made, had no estate to convey.¹

(b) *Private Grant.*

Deed.—The voluntary surrender or conveyance of lands from one person to another is called *alienation*, and the legal evidence of such alienation is termed a *deed*—a name of very ancient origin and extensive signification.

Title by deed is the most common form of purchase, and that by which the great bulk of all the real property in the country is held. The term “deed” is very comprehensive, and denotes not only all classes of instruments for the conveyance of real estate, but any instrument in writing under seal, whether relating to land or any other matter. In its popular acceptation, however, it is confined to conveyances of land, or estates or interests therein, and is still further restricted in its meaning to absolute sales, as distinguished from mortgages, indicating conditional sales, though the latter are as essentially deeds as the former. In its broad signification it is the highest form of expression of title known to the law.

Anciently a distinction was made between deeds of feoffment and deeds of grant, the former relating to corporeal and the latter to incorporeal property, but this distinction no longer has any practical existence; and, generally speaking, all deeds now in common use are deeds of grant.²

There is a further distinction in this connection between deeds and conveyances made by persons in their own right and those made by fiduciaries and officers acting under a power. This latter mode of acquiring title has by some writers been classed as a distinct method under the name of title by *office grant*;³ but while the name “official grant”

¹ Willot v. Sanford, 19 How. 79.

³ See Wash. Real Prop. 209; 4

² See Dudley v. Sumner, 5 Mass. Kent, Com. 428.

quite fully and clearly defines the character of such conveyances, they yet constitute but one form of title by deed.

So, too, it is not uncommon to find title classified as by "execution," by "decree," etc., but such classifications are misleading and sometimes erroneous. Under sales by virtue of executions or decrees the purchaser acquires no legal estate in the land sold, but only the right to a conveyance in case the sale is confirmed and no redemption is had.¹ Prior to deed the right to the possession and profits of the land remains with the debtor, while the equity held by the purchaser is practically but a lien thereon for the amount of his bid.² In all cases where a redemption is permitted, the legal estate of the judgment debtor is not divested by the sale until after the period allowed for redemption, nor even then, unless the sale has been consummated by a deed from the proper officer.

Dedication.—Where lands are set apart or surrendered by the owner for some public use, the act is termed a *dedication*. In such event the public at large, and not merely a public corporation, society or individuals, must be the chief beneficiary;³ and, properly speaking, there can be no valid dedication to private uses.⁴ It would seem, however, that a dedication for the use of a limited portion of the public may still be valid as a *charitable use*,⁵ and, if so made that the holder of the estate becomes a trustee for the purposes of the charity, will be effectual for the purpose intended.⁶

Dedications are susceptible of several classifications. The first, and most general, is a division into *express* and *implied*;

¹Smith v. Calvin, 17 Barb. (N. Y.) 157; Evertson v. Sawyer, 2 Wend. (N. Y.) 507; Bowman v. People, 82 Ill. 246.

²Vaughn v. Ely, 4 Barb. (N. Y.) 159.

³Todd v. Railroad Co., 19 Ohio St. 514; M. E. Church v. Hoboken, 33 N. J. L. 13.

⁴State v. Tucker, 36 Iowa, 485; M. E. Church v. Hoboken, 33 N. J. L. 13.

⁵As for a training ground or burial place. Nowry v. Providence, 10 R. I. 52.

⁶See 3 Wash. R. P. (4th ed.) 72.

the former being where the act is performed by deed or other writing, vote, overt acts or declarations; the latter rests on a presumption, and results from acquiescence in the public use. A further distinction is made in the United States between *common-law* and *statutory* dedications, and some writers make this the primary classification; but a critical examination will demonstrate that statutory dedication is but one form of express dedication, and differs from a common-law dedication, not so much in the method of performance as in its effects. A third distinction exists between dedications *absolute* and to *specific uses*, and by far the greatest amount of litigation which has attended this branch of the law has originated in questions growing out of this distinction.

The law requires no particular form or solemnity to constitute a valid dedication, the intention of the owner being the vital principle, and this may be evidenced by the owner's acts or declarations, and the circumstances under which the user has been permitted.¹

At common law, when the right of the public to the use of land rests upon no other foundation than a dedication to public uses, the easement vests in the public, while the fee remains in the original owner, and may be conveyed by him to third persons; but the right of the public to the use is paramount to the title of the owner of the fee, and does not require the fee for its protection.²

Under the statute, as now in force in a majority of the states, not only the beneficial enjoyment, but the fee of the land appropriated vests in the public. In such event, where the statutory requisites are complied with, the fee passes as an incident, and the municipality holds the legal title to same for public use or purpose intended by the donor.³

¹ Wood v. Hurd, 34 N. J. L. 87; N. J. L. 13; Cincinnati v. White, 6 Buchanan v. Curtis, 25 Wis. 99; Pet. (U. S.) 431. Compare Wilson McIntyre v. Storey, 80 Ill. 127; v. Sexton, 27 Iowa, 15.

Shear v. Stothart, 29 La. Ann. 630. ³ Manly v. Gibson, 13 Ill. 308;

² M. E. Church v. Hoboken, 33 Railroad Co. v. Joliet, 79 Ill. 25.

(c) *Confirmation.*

Nature and operation.— *Confirmation* is that peculiar species of conveyance whereby an estate which was voidable or inchoate is made valid and certain, or where a particular interest is increased. It is not an original method of passing title, and only operates on an estate or right in lands to one who already has the possession of same or some right or interest therein.

Though deeds of confirmation are in use between individuals, the term is usually applied to those confirmatory acts of government whereby inchoate or uncertain rights derived from the national government or from foreign powers are ratified and approved, and relates to the origin of title. From the earliest period in the history of the country, claims to tracts of land, upon which persons have settled and made improvements in advance of the public surveys, and before the lands have been offered for sale, sometimes upon the express invitation of the public authorities, and sometimes upon their supposed acquiescence, have been presented for the equitable consideration of the government. Such claims in great numbers have arisen under other governments from which we have acquired territory, with treaty stipulations for their protection. Sometimes such claims have been submitted to boards of commissioners for approval or rejection; sometimes they have been referred to the judicial tribunals for determination, and sometimes they have been directly acted upon by congress. A confirmation cannot strengthen a void estate, but only one that is voidable, and is conclusive only as between the government and the confirmee.¹

Confirmation, as a basis of title, relates mainly to imperfect grants of the French, Spanish or Mexican governments, made prior to the annexation of the territory to the United States, and may consist of the judgment or determination of a board of commissioners organized for that purpose, the

¹ Meader v. Norton, 11 Wall. 442.

federal courts, or special act of congress. Though it has been held that a confirmation by law of a claim of title in public lands is to all intents and purposes a grant of such lands,¹ yet it seems that the legal title to lands, confirmed to a private person by act of congress, or by action of government tribunals, remains in the United States until a patent is issued therefor, and, until then, the confirmer has only an equitable title.²

(2) *Title through Act of the Parties by way of Devise.*

Generally considered.—Next to deeds, testamentary conveyances form the most common vehicle for the transfer of interests or estates in land, the instrument for affecting a *post-mortem* transfer being called a *will*; the subject-matter as well as the title by which same is acquired, a *devise*; the maker of the will, a *testator*; and the recipient of the testator's bounty, a *devisee*. A will, which is effective as a conveyance only after the maker's death, is from its own nature ambulatory and revocable during his life, and it is this ambulatory quality which forms the chief characteristic of wills; for though a disposition by deed may postpone the possession or enjoyment, or 'even the vesting, of an estate until the death of the disposing party, yet the postponement in such case is produced by express terms and does not result from the nature of the instrument.³ Title by devise is of the highest dignity, and effective for all purposes, yet may be defeated in the same manner as a title by descent.

¹ Challefoux v. Ducharme, 4 Wis. 554.

² Le Bean v. Armitage, 47 Mo. 138; Amesti v. Castro, 49 Cal. 328. In the settlement of these claims the law has generally provided that a patent of the United States should be issued to the claimant when his claim should have been recognized as valid and entitled to

confirmation; yet the patent, in such cases, is only documentary evidence of the existence of the title, or of such equities respecting the claim as to justify recognition and confirmation. Morrow v. Whitney, 5 Otto (U. S.), 551; Langdeau v. Hanes, 21 Wall. (U. S.) 521.

³ 4 Kent, Com. 520; 2 Black. Com. 502.

Nature of testamentary titles.—One who takes under a will is regarded as a purchaser equally with him who takes under a deed; but the estate and title in the hands of a devisee, while as full and ample as though derived by deed, does not possess that indefeasible character which attaches to it in the latter case. An innocent purchaser by deed takes the title unaffected by latent equities and the undisclosed rights of third persons, but the devisee acquires only the title of the testator as it existed at the time of his death, with all its infirmities and imperfections, and subject to all equities and liens in favor of strangers. Such title, though covering the fee, or whatever interest may have been granted, is liable to be defeated during the course of administration by a sale by the executor in satisfaction of the debts of the decedent;¹ or by the very instrument of its conveyance, when legacies thereby given are expressly charged upon the realty and there exists a deficiency of personal assets;² or where the devise is couched in ambiguous or uncertain language requiring a judicial construction. The two former contingencies can arise only prior to final settlement; the latter at any time before the bar of the statute has intervened. The title to lands devised vests in the devisee immediately upon the death of the testator; and such devisee is entitled to the immediate possession of the lands devised, and to hold the same until, when necessary, they are subjected by the executor to the payment of debts.³

Operation and effect of devises.—It is a rule of the common law that a will operates only upon real estate owned by the testator at the time of making the same, and the title

¹ *Hill v. Treat*, 67 Me. 501; *Vansyckle v. Richardson*, 13 Ill. 171.

² *Wood v. Sampson*, 25 Gratt. (Va.) 845; *Lewis v. Darling*, 16 How. 1. A devisee who takes an estate under a will assumes the payment of legacies imposed upon him by the terms of the will, and

equity will regard him as a trustee and entertain a bill to compel him to perform his trust. *Mahar v. O'Hara*, 4 Gilm. (Ill.) 424; *Burch v. Burch*, 52 Ind. 136.

³ *Hall v. Hall*, 47 Ala. 290; *Hamilton v. Porter*, 63 Pa. St. 332.

to which he retained to the time of his decease. This rule has been very generally changed by statute, which substitutes therefor a more reasonable rule to the effect that every will that shall be made by a testator, in express terms, of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the estate which he was entitled to devise at the time of his death.¹ It is the application of this rule which gives to the residuary clause much of its present importance. Intention, however, is, after all, the true test of a will; and where the intention is manifest, the will speaks from the time intended by the testator, even though before his death.²

Validity of devises.—The several states of the Union possess the power to regulate the tenure of real property within their respective limits, the mode of its acquisition and transfer, the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, as well as the persons or classes of persons who may take under such disposition.³ Resort must therefore be had to the statute to determine the validity of all bequests; and where that defines or enumerates the persons or classes who may take, a devise to persons or classes not therein specified will, it seems, be void.⁴ Where a devise is void by the rules of law, the land descends to the heirs at law of the testator.⁵

Testamentary capacity.—The right of testamentary disposition is controlled by statute, but is given generally to

¹Canfield v. Bostwick, 21 Conn. 550; Peters v. Spillman, 18 Ill. 373.

²Updike v. Tompkins, 100 Ill. 406; Phillipsburgh v. Burch, 37 N. J. Eq. 482.

³United States v. Fox, 94 U. S. (4 Otto), 315; Kerr v. Dougherty, 7 N. Y. 327.

⁴Thus, by a statute of New York, a devise of lands in that state can only be made to natural persons,

and to such corporations as are created under the laws of the state and are authorized to take by devise; a devise, therefore, of lands in that state to the government of the United States was held void. United States v. Fox, 94 U. S. 315.

⁵Deford v. Deford, 36 Md. 168; James v. James, 4 Paige, 115; Hayden v. Stoughton, 5 Pick. 528.

all persons of full (legal) age, being of sound mind and memory,¹ and extends to all species of property and to every right, title and interest therein. Alienage and coverture formerly constituted a common-law or statutory disability, but a gradual removal of restraints on alienation has virtually or expressly abolished such disability in the United States. Infants and persons of insufficient mind are about the only persons upon whom any restrictions are now placed.²

2. *Title through Operation of Law.*

Strictly speaking, all title, whether by purchase or descent, is acquired through operation of law; but for many years courts and writers, in treating of title by purchase, have distinguished between those methods which depend upon the voluntary act and agreement of the parties and such as result from other causes or through other agencies. To these latter is applied the general term which forms the heading to this section. This division includes (1) all those forms of title accruing through operations of nature, as well as (2) such as result from political and civil relations, or (3) grow out of some rule of public policy. These various forms, as detailed in the succeeding paragraphs, constitute all of the methods of title through operation of law now recognized in the United States.

(1) *Title through Operation of Law resulting from Natural Causes.*

Accretion.—The first and principal method of acquiring title through the operations of nature is termed *accretion*, and is the increase of land caused by additions thereto affected by the washing of the sea, a navigable river, or other stream to which the land is contiguous. The increase or

¹To be of sound and disposing mind, the law simply requires that the testator be able to manage his own affairs, and to know intelli- gently what disposition he is making of them. *Harvey v. Sullen's* Heirs, 56 Mo. 372.

²This matter is statutory.

deposit obtained by accretion is technically called *alluvion*, and whether produced by natural or artificial causes inures to the benefit of the adjacent land. It is essential, however, that the increase shall be gradual and imperceptible at any one moment of time.¹ The right to alluvial formation is inherent in the land, and constitutes an essential attribute of it, resulting from natural law in consequence of its situation.² The usual incidents of title attend property acquired by accretion.

With respect to rivers not navigable, by common law the owner of the land adjoining is generally presumed to be the owner of the soil to the central line or thread of the stream.³ This presumption will prevail unless controlled by express words of description which exclude the bed of the river, and in all cases where the river itself is used as a boundary the law will expound the grant as extending to the center or thread. With respect to navigable lakes and rivers, where the public easement is not interrupted, the question of navigability does not arise, and the riparian proprietor will still be entitled to all accretions without regard to navigability.

In applying the principle that land formed by alluvion is the property of the adjoining owner, it is quite immaterial, on non-navigable streams, whether this alluvion forms at or against the shore so as to cause an extension of the bank, or in the bed of the stream and becomes an island. Where an island is so formed in the bed as to divide the channel and form partly on each side of the thread, the opposite sides belong to the respective proprietors, and the island should be divided according to the original thread. When different owners are interested in shore formations, the increase should be divided according to their respective frontages so as to secure to each the benefits which his original frontage gave him.⁴

¹ *Lovington v. St. Clair Co.*, 64 Ill. 56; *Krant v. Crawford*, 18 Iowa, 554; *Benson v. Morrow*, 61 Mo. 352.

² *St. Clair Co. v. Lovington*, 23 Wall. (U. S.) 46.

³ *Hubbard v. Bell*, 54 Ill. 488; *Olson v. Merrill*, 42 Wis. 203.

⁴ For this purpose the following rule may be employed: Measure the whole extent of the ancient

Reliction.—Where land is formed in streams or added to shore lines by the gradual subsidence of waters, the operation is termed *reliction*. The difference between reliction and accretion is but slight, and the effect is the same in either case.¹

Avulsion.—The sudden removal or deposit of land by the perceptible action of water is called *avulsion*, the operation being the reverse of accretion where the land is formed by slow and imperceptible degrees. In the event of a sudden removal or annexation the title to the soil is not changed, as is the case in accretion, and the original boundaries will remain unaffected by the diversion of the water-course.

The term “avulsion” is also applied to the derelict left by the sudden subsidence of water on the sea shore or on navigable rivers. With respect to rights of ownership in such lands the authorities are not altogether harmonious, but the majority, following the common law, place the title to such derelict in the sovereign.² In the case of inland navigable streams the title depends upon local laws, some states claiming title to the bed of the stream, while others concede it to the riparian proprietor, subject only to the public easement of navigation.

line on the river and ascertain how many feet each proprietor owned on the line; divide the newly-formed line into equal parts and appropriate to each proprietor as many portions of this new river line as he owned feet on the old. Then, to complete the division, lines are to be drawn from the parts at which the proprietors respectively bounded on the old to the points thus determined as the new points of division on the newly-formed shore. The new lines thus formed will be either parallel, divergent or convergent, according

as the new shore line of the river equals, exceeds, or falls short of the old. This mode of distribution secures to each riparian proprietor the benefit of continuing to hold to the river shore, whatever changes may take place in the condition of the river or the accretion. See *Deerfield v. Arms*, 17 Pick. (Mass.) 41; *Batchelder v. Keniston*, 51 N. H. 496.

¹ *Warren v. Chambers*, 25 Ark. 120; *Boorman v. Sunnucks*, 42 Wis. 235.

² *Dikes v. Miller*, 24 Tex. 417. See 2 Black. Com. 262.

(2) *Title through Operation of Law resulting from Political and Civil Relations.*

Eminent domain.—The sovereign right of the state to appropriate or subject to public uses the private property of the citizen is called *eminent domain*. Whatever exists, in any form, whether tangible or intangible, is subject to the exercise of this right, including the property and franchises of corporations as well as of individuals.¹ The right is inherent in the state as an attribute of sovereignty, and may be exercised for itself or in favor of individuals or corporations engaged in undertakings of a public nature. When from motives of public policy such right is lodged in a corporation, it will be strictly limited by the uses for the furtherance of which it was conferred. In every event, however, the exercise of the right of eminent domain is primarily and immediately the act of the state, and corporations to whom it has been delegated, and by whom it is immediately asserted, are but agencies or instrumentalities of the state, notwithstanding they may have and generally do have corporate interests intermingled with and growing out of the same.²

While the power of eminent domain can only be exercised for a public use, yet it never has been deemed essential that the entire community, or any considerable portion, should directly enjoy or participate in the benefits to be derived from the purpose for which the property is appropriated. It is enough if the taking tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or leads to the growth of towns, and the creation of new channels for the employment of private capital and labor, such results contributing indirectly to the general welfare and prosperity of the whole community.³

But with the right of condemnation of lands, or any es-

¹ *Rigney v. Chicago*, 102 Ill. 64; ² *Hatch v. Railroad Co.*, 18 Ohio
United States v. Jones, 109 U. S. St. 92.

513.

³ *Talbot v. Hudson*, 82 Mass. 417;
In re Gas Co., 63 Barb. (N. Y.) 437.

tates or interests therein, there is a concurrent obligation to make just and full compensation therefor,¹ and such compensation is always a condition precedent to the appropriation of the property.² So, too, when land has been acquired by the public for a particular use, no additional burden can, as a rule, be superadded without further compensation.³ These, however, are constitutional limitations of the right.

The exercise of the right in the United States is regulated by express statute, and it is a cardinal rule that every statute in derogation of the right of property, or that takes away the estate of the citizen, is to be construed strictly; and no implication can be indulged in that a greater interest or estate is taken than is absolutely necessary to satisfy the language and object of the statute making or providing for the appropriation. Hence, the general rule is that the exercise of the power of eminent domain, particularly when exerted in behalf of corporations, extends only to the use of the property appropriated and does not include the fee.⁴ In such event, should the use be abandoned, the land, disincumbered of the easement imposed by the appropriation, will revert to the owner of the fee. The easement, however, is usually regarded as perpetual, and as such forms the basis of compensation. While this may be taken as the general rule, it is yet subject to modification and exception. It has been held that it is not necessary that exact or technical language should be used in a statute providing for the taking of private property for public use in order to vest the fee in the public; but in such case it must clearly appear that it was the intention of the legislature, as disclosed by the act itself, to take a fee. If any remaining ownership is inconsistent with the use for which the land is taken, and compensation is made for the fee, which is also necessary

¹ Johnson v. Railroad Co., 23 Ill. 202.

³ State v. Laverack, 34 N. J. L. 201.

² Cameron v. Supervisors, 47 Miss. 264; Paris v. Mason, 37 Tex. 447; Cook v. Commissioners, 61 Ill. 115.

⁴ Railroad Co. v. Burkett, 42 Ala. 83; Morris v. Turnpike Road, 6 Bush (Ky.), 671.

for the full use of the property, a fee will be deemed to have been taken in the absence of express words.¹ Indeed, in some of the states the fee passes as an incident,² and excludes any remaining rights in the former owner; but usually the extent of interest, or quantity and duration of the estate acquired by the exercise of this power, is derived from the specific act of appropriation. The power is a legislative one, subject only to constitutional restrictions, and the only conditions requisite to its exercise are the needs of the public and compensation to the owner; when these conditions exist, the right of the state to withdraw the property from private control and subject to public use whatever interest or estate is necessary to accomplish the intended purpose is complete, and this interest, according as the legislature may determine, may consist of an estate for years, for life, a mere easement, a conditional fee, or a fee-simple absolute.³

Escheat.—When the owner of land dies intestate and leaving no heirs, the title to his property vests in the state by an operation of law known as *escheat*. In its original acceptation escheat was the right of the lord of the fee to enter same when it became vacant by extinction of the blood of the tenant. It was one of the incidents of feudal tenures, and is still occasionally mentioned as marking the feudal origin of American land titles. Nothing but the name, however, is feudal, and it is only another instance in which, in our land system, a word is applied in a sense far different from its original meaning. In the United States, escheat, together with all of its incidents, depends upon positive statutes. It does not follow as a matter of right, but of expediency. The lord of the fee holding the ultimate title might, with propriety, assert his ownership, but no such right can be claimed by the state; nor is the idea compatible with the full prop-

¹ Park Commissioners v. Armstrong, 45 N. Y. 234.

³ Consult Cooley's Const. Lim. See, also, 2 Kent, Com., lec. XXXIV;

² Troy v. Railroad Co., 42 Vt. 265; Challis v. Railroad Co., 16 Kan. 117.

erty in land held under an allodial title. It is, however, a rule of civilized society that when the deceased owner has left no heirs, his property should vest in the public and be at the disposal of the government, and, by the general rule of the common law, all real property capable of use and possession, and having no other acknowledged owner, is in theory vested in the king as the head and sovereign representative of the nation; so the state, in its right of sovereignty, may be said to possess the ultimate property of all lands within its jurisdiction.

But while the title to lands of an intestate without heirs vests immediately in the state by operation of law, yet, as a rule, some action is necessary on the part of the state to assert the title thus acquired, which is accomplished by a procedure usually termed "inquest of office." The state, on acquiring lands by escheat, takes the same title as the person last seized, charged with the same trusts, liens and incumbrances to which the property would have been subject had it descended to heirs, the state being for this purpose a statutory heir in default of known kindred.¹

Confiscation.—Closely allied to escheat, but resting on a different foundation, is the method of acquisition known as *confiscation*, being the right to appropriate to the use of the state the property of alien enemies during war. Respecting this power of the government no doubt can be entertained, for it is a cardinal rule, of universal observance, that war gives to the sovereign full right to take the persons and property of the enemy wherever found. The mitigation of this rigorous rule, which the wise and humane policy of modern times has introduced, may to some extent affect the exercise of this right but cannot impair the right itself.²

¹It will be seen from the statements of the text that escheat is practically a form of descent, and, were it not for the reluctance of courts and writers to disturb the classification which has so long prevailed, would properly fall under that head.

²*Brown v. United States*, 8 Cranch (U. S.), 110.

Except in a few instances during the Revolutionary period this right seems to have been restricted to seizure of personal property until the late civil war, when, by act of congress,¹ the right of confiscation of real estate was again asserted. But concurrently with the passage of this act congress also adopted a joint resolution explanatory of the same, whereby it resolved that no punishment or proceedings under the act should be construed so as to work a forfeiture of the real estate of the offender beyond his natural life; and courts, when passing upon the question, have uniformly decided that confiscation proceedings, in effect, reach only the life estate of the owner.² The condemnation goes to the whole estate, however, and extinguishes all the rights possessed by the original owner, leaving in him no estate or interest of any description which he can convey by deed, and no power which he can exercise in favor of another. The forfeiture, therefore, is complete as long as it lasts, and the *proviso*, by way of grace, gives back the land to the heirs of the original owner upon his death.³

Forfeiture.—The term *forfeiture*, when employed to designate a method of acquiring title, has several distinct meanings. In its primary signification it is the means whereby the property of the citizen inures to the state by reason of the violation of law or neglect of legal duty. In the United States this occurs only in case of attainder of treason or non-payment of taxes.⁴ In either case it is in the nature of a penalty, and results as an incident of our reciprocal duties and obligations. In England attainder of treason worked corruption of blood and perpetual forfeiture of the estate of

¹ Act of July 17, 1862.

² *Biglow v. Forrest*, 9 Wall. (U. S.) 359; *Day v. Micou*, 18 Wall. (U. S.) 156; *Dewey v. McLain*, 7 Kan. 126.

³ *Wallach v. Van Riswick*, 2 Otto (U. S.), 202; *French v. Wade*, 12 Otto (U. S.), 132; *Pike v. Wassell*, 94 U. S. 711.

⁴ At common law the offenses which induced a forfeiture to the crown were: (1) treason; (2) felony; (3) misprision of treason; (4) pre-munire; (5) contempt of court; (6) popish recusancy.

the person attainted to the disinherison of his heirs. When the federal constitution was framed, this was felt to be a great hardship, if not a positive injustice, and, for this reason, it was ordained that no attainder of treason should work corruption of blood or forfeiture of estate, except during the life of the person attainted.¹

A forfeiture for non-payment of taxes is based upon the principle that every owner of lands holds his estate upon the implied condition that he will promptly pay his share of the common burdens assessed against the entire community, and if he fails to comply with this condition, and his estate is offered at public sale for such delinquency, and no purchaser can be found for it, the title is transferred from the owner to the state, the latter being always ready to bid for the land when no other bidder appears.² The term "forfeiture" may not always be used in this connection, but the effect, in every instance where the property passes to the state in default of purchasers, is a forfeiture. Such forfeiture operates to divest the title of the original owner, though ample time is generally allowed for redemption, and purchasers of forfeited lands, where the law has been strictly complied with, will acquire a valid title from the state.

So, too, the sale of lands for non-payment of taxes is, in a proper sense, an exercise of the right of forfeiture.

The secondary signification of the term is where an interest or estate in lands reverts to a former owner, by operation of law, on breach of a condition annexed thereto. Forfeitures of this kind are not favored in law, and courts eagerly seize hold of any circumstances by which same may be defeated; and where adequate compensation can be made, the law in many cases, and equity in all cases, will discharge the forfeiture upon such compensation being made.

Tax titles.—The last species of title resulting from political and civil relations is that which is raised for the benefit

¹ The same rule now prevails in England.

² See Blackw. Tax Tit. *460; Clery v. Hinman, 11 Ill. 430.

of a purchaser at tax sale and which is generally known as *tax title*.¹ It is a fundamental proposition that all property of the citizen is subject to a just proportion of the burdens of taxation in return for the protection which the state affords. A tax, when assessed, is in one sense a personal debt, and may be collected by any of the legal methods provided by law; yet it is not an ordinary debt, for it takes precedence of all other demands, and is a charge upon the property assessed without reference to the matter of ownership. In case of the non-payment of the debt, the state, in the exercise of the perpetual lien which by virtue of its sovereignty it possesses upon all taxable lands within its limits, may seize and sell the land charged with the tax, although there may be prior liens and incumbrances upon it, and thus enforce payment to the exclusion of all other creditors.

The title raised by such a sale is a purely technical as distinguished from a meritorious title, and depends for its validity upon a strict compliance with all the requirements of law.²

A tax title, though bearing some resemblance to titles derived under judicial and execution sales, differs in this: that the latter are strictly derivative titles, and dependent not only on the legality of the procedure of transfer, but upon the acts of former owners. A tax title, on the contrary, from its very nature has nothing to do with the previous chain of title, nor does it in any way connect itself with it. The person asserting it need go no further than his tax deed, and the former title can neither assist nor prejudice him. The sale operates upon the land and not upon the title; and it matters not how many different interests may have been connected with the title, if it has been regularly sold, the property, accompanied by the legal title, goes to the pur-

¹ Mr. Washburn classifies this form as title by *office grant*. ² *Altes v. Hinckler*, 38 Ill. 265; *Hewes v. Reis*, 40 Cal. 225. Wash. Real Prop. 209.

chaser. No covenants running with the land, or other incident to the title, as a title, passes to the purchaser, but he takes the land by a new, independent and paramount grant.¹

(3) *Title through Operation of Law resulting from Public Policy.*

Estoppel.—Nearly all of the elementary writers, when treating of the subject of real property, mention, among other methods of purchase, the acquisition of title by *estoppel*. Strictly speaking, however, this is not a method of acquiring title at all, but simply a recognition of an existing title. The principle of estoppel is that, in order to accomplish the purposes of justice which cannot otherwise be reached, the law will draw certain conclusions from the acts of one party in favor of another, in respect to the ownership of lands, and which it will not allow the former to controvert or deny.² It will be seen, therefore, that a title is rather presumed than acquired by estoppel by precluding parties, by reason of their former acts, from asserting anything to the detriment of such title. At the same time it must be remembered that estoppels are not favored in law, for the object of the administration of justice is to discover and apply the truth; yet there are cases in which courts are bound to say to a litigant that he has, to his own advantage or to the injury of his adversary, asserted that which is false, and that, having done so, he must be forever forbidden to unfold for his own benefit the truth of the matter.³

Estoppels are classified, according to their nature, as *technical*, or by record or deed, and *equitable*, or *in pais*. Courts at the present day incline to restrict the doctrine of tech-

¹ See *Chicago v. Larned*, 34 Ill. 279; *Bank v. Billings*, 4 Pet. (U. S.) 561; *Beatty v. Mason*, 30 Md. 409; *Wofford v. McKinna*, 23 Tex. 43; *Harding v. Tibbils*, 15 Wis. 232, for a discussion of the principles stated in the text. Consult, also, *Blackwell on Tax Titles*.

² See 3 Wash. Real Prop. 70.

³ *Sinclair v. Jackson*, 8 Cow. (N. Y.) 586; *Douglas v. Scott*, 5 Ohio, 199; *Ham v. Ham*, 14 Me. 351.

nical estoppel and to favor an equitable estoppel. Mutuality is an essential ingredient of estoppels; and it follows from the very principle on which the whole doctrine rests that they can operate neither in favor of nor against strangers, but affect only the parties and their privies in blood, law or estate. A third party derives no advantage from, nor can he be bound by, an estoppel, and this rule applies equally whether the estoppel arises by record, deed, or matter *in pais*.¹

Estoppel by record is based upon the rulings and determinations of the courts, and proceedings had therein. The estoppel of a judgment extends only to the question directly involved in the issue, and not to any incidental or collateral matters.² The reversal of a judgment destroys its efficacy as an estoppel.³

Estoppel by deed arises from the provisions contained in conveyances of land, either by recital, admission, covenant or otherwise, whether in express terms or by necessary implication, and parties giving and receiving same, together with their privies, are estopped from denying the operation of the deed according to the manifest intent.⁴ In controversies concerning the title to real estate, the question of estoppel most frequently arises in construing covenants; and it is a general rule that where a person conveys land with a general warranty, he having no title at the time, but afterward acquires title to same, such acquisition inures to the benefit of the grantee, because the grantor is estopped to deny, against the terms of his own warranty, that he had the title in question.⁵

Estoppel in pais rests upon the principle that a party has

¹Chope v. Lorman, 20 Mich. 327; ⁴Tobey v. Taunton, 119 Mass. Simpson v. Pearson, 31 Ind. 1; Mc- 404; Atlantic Dock Co. v. Leavitt, Donald v. Gregory, 41 Iowa, 513. 54 N. Y. 35; Foster v. Young, 35

²Lewis' Appeal, 67 Pa. St. 153; Iowa, 27.

Dixon v. Merritt, 21 Minn. 196. ⁵Burtner v. Keran, 24 Gratt.

³Smith v. Frankfield, 77 N. Y. (Va.) 43; Wiesner v. Zaun, 39 Wis. 414. 188.

misled another to his prejudice, under such circumstances that it would be a fraud for him to assert what may be the truth. Hence, to raise an estoppel from former declarations or admissions by a party to prevent him from setting up his title to property, the facts must show: (1) That when making the statements or admissions relied upon he was apprised of the true state of his own title; (2) that he made the statement or admission with the express intention to deceive, or with such careless or culpable negligence as to amount to constructive fraud; (3) that the other party had neither knowledge of the true state of the title nor convenient means of acquiring such knowledge by the use of ordinary diligence; (4) that he relied directly upon such statement or admission, and will be injured by allowing its truth to be disproved.¹

It will thus be seen that the important and primary ground of estoppel *in pais* is, that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted; but no one can set up another's act or declaration as the ground of an estoppel, unless he has himself been deceived by it,² and a party never can be estopped by an act that is illegal and void.³ An estoppel *in pais*, unlike that by deed, operates only on existing rights.

At law the doctrine of equitable estoppel cannot be applied to work a transfer of property which, by the statute of frauds, can be effected only by a writing, and the legal title must always prevail; yet, although a party cannot divest himself of such an estate by parol, he may, without writing, so conduct himself with reference to it that he will be estopped afterward to assert a claim thereto; and this principle is applied without reference to the statute of frauds.⁴

¹Martin v. Zellerbach, 38 Cal. 300; McCabe v. Raney, 32 Ind. 309; McKinzie v. Steele, 18 Ohio St. 38; Devries v. Haywood, 64 N. C. 83.

Halloran v. Whitcomb, 43 Vt. 306; ³Mattox v. Hightshue, 39 Ind. 95.
Horn v. Cole, 51 N. H. 287.

⁴Railroad Co. v. Ragsdale, 54 Miss. 200; Kelly v. Hendricks, 57

The doctrine of estoppel does not ordinarily apply to the state as it does to individuals. The sovereign power is but a trustee for the people. It acts by its agents, and the people should not be bound by any statement of facts made by those agents. For their benefit the truth may always be shown, notwithstanding any former statement to the contrary.¹ This principle rests, in part at least, upon the general doctrine that the state cannot part with its title to land except by grant or other record evidence. An apparent exception has been said to arise in those cases in which the act sought to be made binding was done in its sovereign capacity by legislative enactment or resolution; but this is not so much an exception to the general doctrine of estoppel by acquiescence in an authorized act of a mere subordinate agent, as it is an original binding affirmative act on the part of the state itself, made in the most solemn manner in which it can give expression to the sovereign will.

Prescription.—By the law of nature, observes an old writer,² occupancy not only gave a right to the temporary use of the soil, but also a permanent property in the substance of the earth itself, and to everything annexed to or issuing out of it. Hence, possession was the first act from which the right of property was derived; it has therefore become an established rule of law, in every civilized country, that a long and continued possession will confer title to real property. This mode of acquisition is known as *prescription*. Yet, like the subject considered in the preceding paragraph, prescription is not, in the proper sense of the term, an acquisition, but rather a recognition of title, and is founded upon the presumption that the party in possession of lands would not have been permitted by other claimants to hold and enjoy same without a just and paramount right.

Ala. 193; *Hayes v. Livingston*, 34 Mich. 384. *Johnson v. United States*, 5 Mason (Cir. Ct.), 425.

¹*Fannin Co. v. Riddle*, 51 Tex. 360; *Farish v. Coon*, 40 Cal. 50; ²*Cruise*, Dig., tit. XXXI, § 1.

Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration that the facts are such as could not occur, according to the ordinary course of human affairs, unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession.¹ Prescription, in the original and ancient meaning of the word, rests upon the supposition of a grant, and the use or possession on which such title is founded must be of such a nature as to indicate that it is claimed as of right, and not the effect of indulgence, or of any compact short of a grant. Such use and possession must further have continued for a time "whereof the memory of man runneth not to the contrary."²

The period of legal memory or prescription does not, at common law, extend farther back than sixty years, while forty years is usually a sufficient length of time to establish a prescriptive title; but in the United States it is the policy of courts to limit the presumption of grants to periods analogous to those of the statute of limitations, in cases where the statute itself does not apply.³

In its early and technical signification, prescription applied only to incorporeal hereditaments, or such property as lies in grant; but as all kinds of property now lie in grant, the distinction, under the land system of the United States, is practically of little or no force or effect. Nor is the rule of immemorial usage now much resorted to, except in connection with statutes limiting the time for entry upon land.

Limitation.—Closely resembling the general features and partaking of the same nature as prescription is that form

¹ Gayetty v. Bethune, 14 Mass. 49; ³ Hunt v. Hunt, 3 Met. (Mass.)
Ingraham v. Hutchinson, 2 Conn. 175; Watkins v. Peck, 13 N. H. 360;
584; Emans v. Turnbull, 2 Johns. Shumway v. Simons, 1 Vt. 53; Oke-
(N. Y.) 322. son v. Patterson, 29 Pa. St. 22.

² See Coolidge v. Learned, 8 Pick.
(Mass.) 508.

of title asserted under and by virtue of statutory enactments prohibiting the maintenance of actions for the recovery of real property after the lapse of a certain number of years, and known as *limitation*. While the terms "prescription" and "limitation" are often used interchangeably, and while the reason for the statute of limitations must undoubtedly be sought in the general doctrines of prescription, yet the statute, unlike immemorial usage, does not rest on any presumption, but is a positive rule of law established for the quieting and repose of titles.¹ In the United States the period of limitation with respect to real actions, or rights of entry upon lands, has been quite uniformly fixed at twenty years after the cause of action or right of entry shall have accrued; and where lands have been adversely held and enjoyed for this period, a valid and substantial title is raised by limitation.

To support this title, however, the original entry must have been made under color or claim of title, while the possession, to be adverse, must be so open, visible and notorious as to impart notice to all persons interested that a claim of right is intended thereby. To furnish the basis of a substantial title such possession must not only be hostile and inconsistent with the claim of others, but the claim of right which accompanies same must not have originated in fraud; and to perfect such title the possession must extend in unbroken continuity over the entire period prescribed by the statute.²

A clandestine entry will never serve to set the statute in motion; for in order to bar the true owner he must have actual or constructive notice of the claim, and the entry must be made and possession continued under such circumstances as to enable such true owner, by the exercise of reasonable diligence, to ascertain the fact of entry and the right and claim of the party making it.³ So, too, permis-

¹ See 3 Kent, Com. 442; 2 Greenl. Lee, 48 Mo. 335; Cahill v. Palmer, Ev., § 539. 45 N. Y. 484.

² Carroll v. Gillien, 33 Ga. 539; ³ Fugate v. Pierce, 49 Mo. 441; Beatty v. Mason, 30 Md. 409; Dixon Soule v. Barlow, 49 Vt. 329. v. Cook, 47 Miss. 220; Bowman v.

sive user can never, by any lapse of time, ripen into a title, when the original entry was by consent of the owner and no adverse claim of ownership has been asserted.¹ Nor can a mere trespass ever ripen into a right, no matter how long continued;² nor will occupation by mistake or ignorance suffice to constitute an adverse holding.³ In every case, to bar the assertion of the legal title, the possession must be hostile, and under a claim of exclusive right.

As previously stated, the adverse entry must be made under color or claim of title. *Color of title* generally imports documentary evidence of some kind, so far good in appearance as to be consistent with the idea of good faith, and purporting on its face to convey title.⁴ *A claim of title* may exist wholly by parol.⁵ Possession under a claim of title, without a conveyance or other written instrument, limits the person so asserting his claim to his actual inclosure or occupancy;⁶ but when founded upon a claim and color of title, a constructive possession of the entire tract will follow the actual occupancy of any portion, provided the deed or other matter be of record.⁷ In either case, when the entry is followed by a continuous and uninterrupted possession for the entire statutory period, it will constitute an adverse holding, effective for all purposes, however groundless the supposed title may be.⁸

Persons under disability are specially excepted from the operation of the statute, and their rights in land are not only protected during the period of disability but for a certain time after it has ceased. This class generally includes infants, insane persons, and persons imprisoned on a criminal

¹ Railroad Co. v. Ross, 47 Ind. 25;
Bedell v. Shaw, 59 N. Y. 46.

⁵ Hamilton v. Wright, 30 Iowa,
486.

² Thompson v. Pioche, 44 Cal.
508; Nowlin v. Reynolds, 25 Gratt.
(Va.) 137.

⁶ Dills v. Hubbard, 21 Ill. 328.

⁷ Brooks v. Bruyn, 18 Ill. 539;
Tritt v. Roberts, 64 Ga. 156.

³ Thomas v. Babb, 45 Mo. 384;
Farish v. Coon, 40 Cal. 33.

⁸ Ford v. Wilson, 35 Miss. 504;
Grant v. Fowler, 39 N. H. 104.

⁴ Baker v. Swan, 32 Md. 355;
Kruse v. Wilson, 79 Ill. 240.

charge for any period less than life.¹ Nor will the statute generally be permitted to run against a remainder-man until the termination of the precedent estate,² while as against reversioners there can be no adverse possession. It can only exist against one entitled to possession; that is, against one whose right of entry has accrued.³ So too, as a general rule, the statute of limitations does not run as between tenants in common, for the reason, in part at least, that the possession of one, in contemplation of law, is the possession of all.⁴

Neither will the statute run against the state. That no laches can be imputed to the king, and that no time can bar his rights, was the maxim of the common law, founded on the principle of public policy, that, as he was occupied with the cares of government, he ought not to suffer from the negligence of his officers or servants. This principle is applicable to all governments, which must necessarily act through numerous agents, and is essential to a preservation of the interests and property of the public.⁵ It is upon this principle that in this country the statutes of a state prescribing periods within which rights must be prosecuted are held not to embrace the state itself,⁶ unless it is expressly designated, or the mischiefs to be remedied are of such a nature that it must necessarily be included. So, too, as the legislation of a state can only apply to persons and things over which the state has jurisdiction, the United States are necessarily excluded from the operation of such statutes.⁷ As adverse possession cannot run against the government, it logically follows that the claim cannot be asserted against a grantee of the government where the adverse entry is made prior to the government's conveyance.

¹ Married women are sometimes included in this exception.

² *Christie v. Gage*, 71 N. Y. 189; *Dugan v. Follett*, 100 Ill. 581.

³ *Gernet v. Lynn*, 31 Pa. St. 94; *Raymond v. Halder*, 2 Cush. (Mass.) 269.

⁴ *Florence v. Hopkins*, 46 N. Y. 182; *McQuiddy v. Ware*, 67 Mo. 74.

⁵ *Gibson v. Chouteau*, 13 Wall. (U. S.) 92.

⁶ *Gardiner v. Miller*, 47 Cal. 570.

⁷ *United States v. Hoar*, 2 Mason, 312.

Generally, however, when title to land has been matured by twenty years' adverse possession and enjoyment, it becomes equally as strong as one obtained by grant,¹ and creates in the person so asserting same, if otherwise unimpaired, a legal title to the fee which is effective for all purposes.² In many states, ten, seven, or even five years' uninterrupted possession under color of title, coupled with acts of ownership, payment of taxes, etc., will, under the operation of the statute, cure defects in the instrument under which the entry was made, and bar all actions for the recovery of the land, thus securing to the occupant a valid title in law, no matter how defective the title of the grantor or the instrument of conveyance may have been.

Relation.—The doctrine of *relation* is a fiction of law, adopted by the courts solely for the purpose of justice, and is applied, in conveyances of land, to equitable titles which subsequently mature, either by act of the parties or by operation of law, into legal titles; and when several acts concur to make a conveyance, the original act will be preferred, and to this the other acts will have relation. The fiction of relation is, that the intermediate alienee of the incipient interest may claim that the grant inures to his benefit by an *ex post facto* operation. In this way he receives the same protection at law that a court of equity could afford him. Thus, the assignee of a certificate of the purchase of school land, the purchase-money being all paid, conveyed the premises by quitclaim deed; a few days afterward he received the patent for same, and it was held that the legal title passed to his grantee. So, where a deed is made in pursuance of a recorded land contract, it will be held to relate back to the date of the contract and convey the title as it stood at the time the contract was recorded.³ The same doctrine also applies

¹ *Sherman v. Kane*, 86 N. Y. 57; *Schneider v. Botsch*, 90 Ill. 577.

³ *Welch v. Dutton*, 79 Ill. 465; *Snapp v. Pierce*, 24 Ill. 156.

² *Covington v. Stewart*, 77 N. C.

to grants of unlocated land, the subsequent location operating by relation to the original grant.¹

The fiction, as a rule, is only employed where several proceedings are required to perfect a conveyance of land, and is designed for the security and protection of those who stand in some privity with the party that instituted the proceedings and acquired the equitable claim or right to the title. It does not affect strangers not connecting themselves with the equitable claim or right by any valid transfer from the original or any subsequent holder.²

¹ *Dequindre v. Williams*, 31 Ind. 444.

² *Gibson v. Chouteau*, 13 Wall. (U. S.) 92.

CHAPTER IV.

THE PARCELING OF LANDS.

Generally considered.—We have heretofore considered the nature of the *corpus* of real property, or the tangible subject-matter that forms the substance of same, as comprised in the term “land,” as well as the interests that may be held therein and the methods by which such interests may be acquired. But in order that the land-owner may be protected in the enjoyment of his estate and rendered secure in his title thereto, it is necessary that the superficial area of his claim shall be definitely and accurately established. In all cases of original grant the specific quantity of land conveyed must, in some manner, be ascertained, and this, in conveyancing, is known as the *parcel*. To accomplish this a *description*, certain in its character and capable of actual location, must be provided. To meet this want a system of measurements has been devised, and the adaptation of this system to practical uses in the parceling of land is technically known as *surveying*. The method employed for the computation of areas and the measurements of distances is further known as *plane surveying*.¹

In the primary division of the public lands, and usually in all subsequent subdivisions of considerable area, the measurements are made with what is called a “gunter's chain,” which consists of a metal chain sixty-six feet long and composed of one hundred links. Twenty-five of these links make one rod; but in practice rods are now seldom used, distances

¹It is said that the ancient science of geometry grew out of the practice of surveying, and its origin is ascribed to the changes which annually took place from the inundation of the Nile, and to the consequent necessity of adjusting the claims of each person respecting the limits of lands.

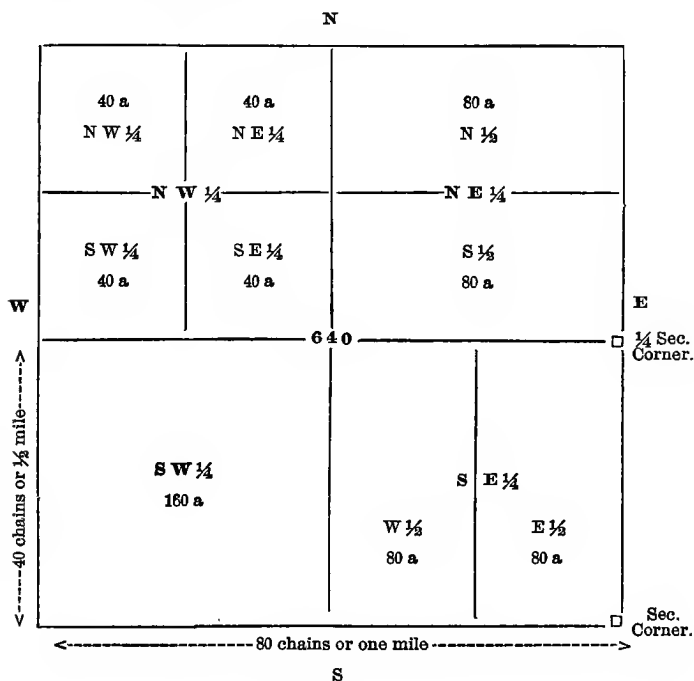
being taken in chains and links. In smaller parcels, particularly of urban property, distances are taken in feet and inches. The contents of land are usually estimated in miles, acres and hundredths of an acre. Small parcels in populous cities, and occasionally in other places, are sometimes estimated in square feet and inches.

Divisions of the public domain.—The public lands of the United States are ordinarily surveyed into rectangular tracts bounded by lines conforming to the cardinal points, according to the true meridian.¹ The largest of these divisions, called a *township*, is a body six miles square, having reference to an established principal *base line* on a true parallel of latitude, and to a longitude styled a *principal meridian*, and contains (as near as may be) twenty-three thousand and forty acres. The townships are subdivided into thirty-six tracts, each one mile square, called *sections*, and containing (as near as may be) six hundred and forty acres. Any number or series of contiguous townships situate north or south of each other constitute a *range*. As it is impossible to strictly follow the letter of the law in regard to the public surveys, owing to the convergency of the meridians, an inequality develops, increasing as the latitude grows higher. The excess or deficiency is added to or deducted from the western or northern ranges of sections or half-sections in each township according as the error may be in running the line from east to west or from north to south. The townships bear numbers in respect to the base line, either north or south of it, and the ranges bear numbers in respect to the meridian

¹This system, which is essentially American in all its details, was reported from a committee of congress May 7, 1784. Thomas Jefferson was the chairman of this committee, and to him the credit of its invention is usually accorded, but beyond the committee's report its origin is not positively known. It is thought the square form of

states, provided in Virginia's deed of cession of her western territory, may have influenced Mr. Jefferson in favor of a square form of surveys, although in the colony of Georgia a square form of surveying had been in vogue in eleven townships for fifty years prior thereto.

Subdivision of sections.— Though the section is the smallest division of public land the lines of which are actually run by the government surveyors, smaller divisions are contemplated by law, and provision is always made for their ready ascertainment, which is done by running true lines from one established point to another. These legal subdivisions vary from a quarter-section, containing one hundred and sixty acres, to a “quarter-quarter” section, containing but forty acres. The shape and area of the sectional subdivisions will be better understood, perhaps, by reference to the following diagram:

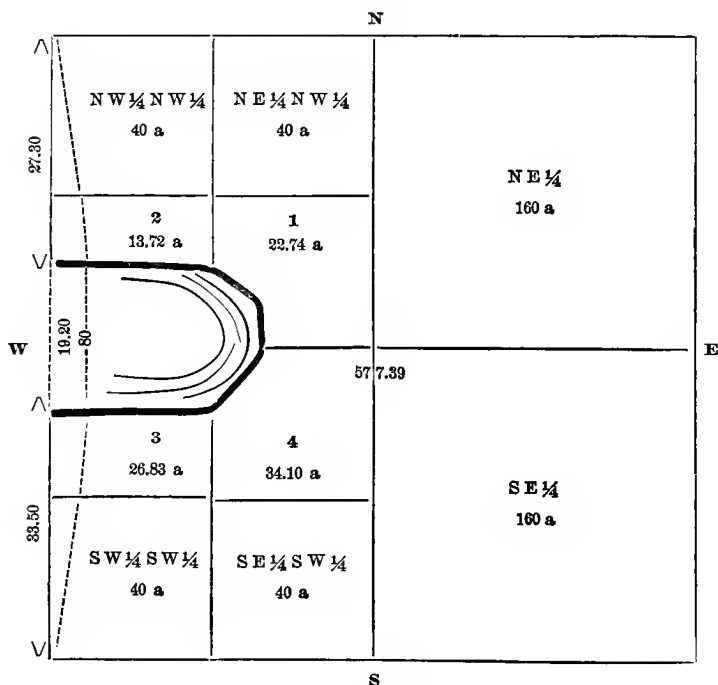


The foregoing illustration contemplates only an ordinary survey, where no obstacles intervene to interrupt the symmetry of the map, or interfere with the running of the lines;

nor does it provide for deficiencies or excesses, which will frequently occur in sections 1, 2, 3, 4, 5, 6, 7, 18, 19, 30 and 31, the greatest discrepancy being found in section 6. The legal presumption is, however, that the section contains six hundred and forty acres.

The section and quarter-section corners are established as indicated in the diagram; the half-quarter sections are not marked in the field, but are regarded by the law as points intermediate between the half-mile or quarter-section corners.¹

Where navigable lakes, streams, etc., intercept the surveys they produce fragmentary divisions known as "fractional" sections, quarters, etc., the divisions of a fractional section



¹ Act of April 24, 1820.

being also known as "lots." Meander corner posts are established at all those points where township or section lines intersect the banks of such rivers, bayous, lakes or islands as are by law directed to be meandered, and the courses and distances on meandered navigable streams govern the calculations wherefrom are ascertained the true areas of the tracts binding on such streams. In the sale of such fractional tracts or lots, which always conform, as near as may be, to the size and shape of the regular subdivisions, the specific lot is sold by the acreage as returned by the government surveyors. The diagram on preceding page will serve to illustrate the subject more fully.

Rectangular surveying.—The rectangular system of surveying above stated has now been in operation in the United States for over one hundred years.¹ Its advantages over other methods consist in its economy, simplicity in the process of transfer, brevity of description in deeding the premises, and in the convenience of reference of the most minute legal subdivision to the corners and lines of sections.² The principal base, principal meridian, standard parallels and guide meridians constitute the framework of the rectangular system of public surveys, and there are at present permanently established twenty-three principal bases and thirty principal meridians,³ controlling the public surveys in the land states and territories.

Ordinarily the public surveys are governed by one principal base and principal meridian, but in a few districts and on the Pacific slope a number of different initial points are necessitated by abrupt mountains throughout the district. The lines of public surveys over level grounds are measured with a four-pole chain of sixty-six feet in length, eighty

¹ It was formally adopted May 20, 1785.

² See Zabriskie's Land Laws, 508; Instructions Comm'r Gen. Land Office, May 3, 1881; Government Manual of Surveying, 1883.

³ These are divided into six numerical meridians and twenty-four independent meridians, named after the locality which they control.

chains constituting a mile; but where the features of the country are broken and hilly a two-pole chain is used. The lines and corners thus run are marked and perpetuated by blazing trees, stones, mounds or other monuments, the witness monuments, bearings and distances being ascertained and described in the field-notes.

Meander lines.—In surveying fractional portions of the public lands bordering on navigable lakes or rivers *meander lines* are run, not as boundaries of the tract, but for the purpose of defining the sinuosities of the bank of the stream, and as the means of ascertaining the quantity of land in the fraction subject to sale, and which is to be paid for by the purchaser.¹ Fractional divisions, made so by the interference of water, are designated and sold by the numbers attached to the lots, and reference is always had to the notes of survey. The water in these notes is always the boundary, and where there exists a difference between the meandered line as run and the existing line of the water-course, the latter and not the former is to be considered the true boundary.² Yet, though a meandered line is generally considered as following the windings of a stream, the question whether it does so or not may be determined by evidence *aliunde*, and the mere fact that it is run and designated upon the plats as a meandered line is not conclusive against the government; and it has been held that an entry of government land, bounded by a meandered line, does not include land lying at the time between such meandered line and the bank of the river.³

Where fractional pieces of land are patented, bounded in part by a stream or bayou, the original plat may be resorted to, and the lines as originally run will control. This is the rule adopted in determining controversies between contigu-

¹ *Railroad Co. v. Schurmeir*, 7 Wall. (U. S.) 272.

³ *Lammers v. Nissen*, 4 Neb. 245. But see *Wright v. Day*, 33 Wis. 260,

² *Boorman v. Sunnucks*, 42 Wis. 233; *Houck v. Yates*, 82 Ill. 179. and authorities last cited.

ous proprietors of fractional lands, the patentees and those claiming under them being restricted to the boundaries as shown by the plats and field-notes. In all cases where land is made fractional by a navigable water-course, the patentee purchases by the plat, and a patent for a fractional part of a quarter-section on one side of a water-course, where the area sold is noted on the plat of the fractional tract called for by the patent, will not extend his entry and purchase across the stream, so as to embrace that part of the quarter on the other side.¹

Plats and subdivisions.—Agricultural lands seldom receive any other subdividing than that afforded by the government survey, but in cities, towns and villages the necessities of society require a most minute subdivision into what are popularly termed *blocks* and *lots*. Original subdivisions again become subject to re-subdivision, and these re-subdivisions in turn are not infrequently divided to meet the exigencies of social or business relations.

The formal act of resurveying is technically termed a *sub-division*; the result of the survey when projected upon paper, a *plat*. These subdivisions and plats play an important part, both in conveyancing and in the examination of titles, and upon them no small portion of the validity of land titles rests. In every community of any appreciable size, lands are conveyed and described with special reference to these plats and subdivisions, the government survey being referred to only incidentally and for the purpose of greater certainty in locating the particular tract which forms the subject of the plat.

Where a conveyance gives no other description of the land than the lot or block of a survey or subdivision, the authentic plat of such survey is as much a part of the deed as if set out in it,² and a reference to a plat is as effective by way of estoppel as express words of grant or covenant.³

¹ McCormick v. Huse, 78 Ill. 363. ³ Baxter v. Arnold, 114 Mass. 577;

² Dolde v. Vodicka, 49 Mo. 100; Cox v. James, 45 N. Y. 557.
Powers v. Jackson, 50 Cal. 429.

A reference to a plat by lot and block has usually a more controlling influence than a special description; and when a designation by lot is followed by a description by metes and bounds embracing an area less than the lot, it has been held to import an intent of the grantor to convey the whole lot, the law presuming the addition to be merely an intent to give a more particular description.¹

Formal requisites of plats.—The formalities attending the platting and subdividing of land are the subject of express statutory provisions in all the states, and, unlike deeds, there are no common or uniform methods, each state providing its own system of platting and authentication. Ordinarily the plat must show the shape and exterior boundaries of the land it is intended to represent, and of each subdivision thereof; the length and courses of all boundary lines; the monuments erected in the field; and the name of the tract so divided, as well as the streets, etc., shown thereon, together with the width of such streets, alleys, etc. Appended to the plat there must usually be a description of the land surveyed, officially certified by the surveyor, and a certificate of acknowledgment by the owner or owners of the land. In addition, municipal regulations sometimes require an approval by the civic authorities.

Registration of plats.—When duly executed, acknowledged and recorded, as provided by law, a certified copy of a plat and subdivision may be used in evidence to the same extent and with like effect as in case of deeds, and by statute such registration and acknowledgment is usually made to operate as a conveyance in fee-simple of such portions of the premises platted as are marked or noted on such plat as donated or granted to the public, or any society, corporation or body politic, and as a general warranty against the donor, his heirs and representatives, to such donee or grantee for their use, or for the use and purposes therein named or in-

¹Rutherford v. Tracy, 48 Mo. 325.

tended, but for no other use. And the premises intended for any street, alley, way or common, or other public use, are held in the corporate name of the municipality in trust to and for the uses and purposes set forth or intended.¹ Selling by a plat which has not been recorded is also a misdemeanor in a majority of the states.

Vacation and cancellation of plats.—The entire doctrine of plats and subdivisions is statutory. Ordinarily a plat may be vacated by the owner of the premises, at any time before he has disposed of any of the property, by a written instrument declaring such intention, executed, acknowledged or proved, and recorded in like manner as deeds of land. Such a declaration, duly recorded, usually operates to destroy the force and effect of the recording of the plat so vacated, and divests all public rights in the streets, alleys, public grounds, etc., laid out or described in such plat.² This is the most simple manner. In some states, however, more formality is required, frequently rendering necessary the intervention of a court, as well to authorize the initiation of proceedings as to approve of such as may be taken.³ The effect is practically the same in either case both as to the owners and the public.

Dedication by plat.—Where a dedication to public use is sought to be established from the acquiescence of the owner in the use of the property by the public, or from acts or declarations of an equivocal character which are consistent with a dedication to the public use, or to the mere permissive use by the public for a temporary though indefinite period of time, the intention of the owner in permitting such use is unquestionably of controlling influence and importance in determining whether property has been dedicated by the owner to public use or not.⁴ But where the

¹ See R. S. Ill. 1845, p. 115; Id. 1874, p. 771; R. S. Wis. 1878, p. 645. v. Dixon, 9 How. 30; Manderschild v. Dubuque, 29 Iowa, 73; Godfrey

² R. S. Ill. 1874, ch. 109, § 6.

³ R. S. Wis. 1878, ch. 101, § 2265. v. City of Alton, 12 Ill. 29; Rees v.

Chicago, 38 Ill. 322.

⁴ Dillon, Mun. Corp., § 498; Irwin

dedication is clearly manifested by unequivocal acts or declarations, upon which the public or those interested in such dedications have acted, the fact that the owner may have entertained a different intention from that manifested by his acts or declarations is of no consequence;¹ therefore if the owner of land subdivides and plats same, or lays out and establishes a town or any addition thereto, and makes and exhibits a map or plan of such town or addition, with streets, alleys, public squares, etc., and sells the lots with reference to such map or plan, the purchasers acquire, as appurtenant to their lots, all such rights, privileges, easements and servitudes represented by such map or plan to belong to them, or to their owners, and the sale and conveyance of lots according to such map implies a grant or covenant, for the benefit of the owners of the lots, that the streets and other public places represented by the map shall never be appropriated by the owner to a use inconsistent with that represented by the map, on the faith of which the lots are sold.²

If the owner of land indicates by a map, or other unequivocal acts or declarations, that a particular lot or square is to be reserved or applied to a particular or specific use, of a *quasi*-public character, and such as to induce purchasers of contiguous or neighboring lots to give a higher price than they otherwise would, the use to which such lot was to be appropriated would no doubt be a *reservation*, and not, strictly speaking, a dedication to public use. But, nevertheless, the difference, so far as the owners of lots purchased on the faith of such reservation are concerned, is merely nominal; for the owner of the property who thus sells it is estopped from appropriating the land so reserved to a purpose inconsistent with that for which it was reserved, or he will be held by such sale to have created a servitude in the property reserved in favor of the dominant estate which he has conveyed, which will prevent his applying the reserved

¹ Lamar County v. Clements, 49 Tex. 347; Huber v. Gazley, 18 Ohio, Tex. 347. 18; Logansport v. Dunn, 8 Ind. 378;

² Lamar County v. Clements, 49 Beaty v. Kurtz, 2 Pet. 566.

property to any other purpose than that for which it was reserved.¹

Ordinarily the fee does not follow a dedication, but remains in the original proprietor burdened with the public use; but in a statutory dedication, by making and recording a plat the fee passes as an incident and is held by the municipality for the use and benefit of the public.² An important distinction will therefore be made between a *common-law* and a *statutory* dedication.

As a necessary sequence, where the title of one who makes a dedication fails, the dedication also fails; but if the owner of the title recognizes the dedication, as where there has been a plat made by the one whose title has failed and the true owner deeds lands according to the plat, he will thereafter be estopped from denying the dedication.³

¹ Harrison v. Boring, 44 Tex. 255; ² Manly v. Gibson, 13 Ill. 308;
Commonwealth v. Rush, 14 Pa. St. Railroad Co. v. Joliet, 79 Ill. 25.
186. ³ Gridley v. Hopkins, 84 Ill. 528.

CHAPTER V.

THE CONVEYANCE OF REAL PROPERTY.

Generally considered.—The transfer of an estate in real property, and incidentally the devolution of the title thereto, is called a *conveyance*. The medium of transfer, or operative instrument of conveyance, may be a deed, will, or other agency authorized or recognized by law as efficient for the purpose. The practical application of the principles we have been considering in the foregoing chapters is exhibited in the drafting, operation and effect of these instruments, which, in technical phraseology, is called *conveyancing*. Formerly conveyancing was a very abstruse and exceedingly complicated science, but modern legislation and judicial construction have stripped the old forms of their redundant verbiage, and many of the technical principles relating to common-law conveyances have become wholly, or in a great measure, inapplicable.

Forms of conveyance.—For practical purposes we may reduce the forms of conveyance under derivative titles to two general kinds — deeds and wills. The subject of wills is reserved for a subsequent chapter. In this chapter and those immediately following will be discussed the general features, incidents, forms, operation and effect of deeds.

All of the different kinds of deeds now in common use in this country are but variations of two original forms which had their origin in England and have been transmitted to us with the rest of our inheritance of the common law. These forms are known respectively as *deeds-poll* and *indentures*, or deeds *inter partes*. Originally the former was used where an obligation was incurred, or an estate was conveyed, by only one of the parties to the transaction, the other being a

mere recipient; the latter, on the other hand, contained mutual transfers or covenants, the one in exchange for the other. A deed-poll was a single instrument, signed by one party and delivered to the other; an indenture consisted of two or more parts, of the same tenor, executed in duplicate by both parties, and interchangeably delivered by one to the other. The name "indenture" is said to have originated from the practice of writing both parts of the agreement upon one parchment, and then cutting them asunder in acute angles.¹ The phrase, "this indenture," still forms the initial to deeds of bargain and sale, though such conveyances are in effect deeds-poll, and affords another instance where common-law forms of expression have been retained after their original meaning and technical significance have been lost. Although the forms have been retained, the practical distinction between deeds-polls and indentures has ceased to exist; and, while indenture is the proper and customary form for deeds *inter partes*, it is not uncommon to find deeds-poll in fact that employ the formula of indentures.²

Incidents of deeds.—The earlier writers describe a number of "requisites"³ or "circumstances"⁴ necessary to a valid deed; but the early "requisites" have been greatly augmented in modern times by the addition of new "circumstances," while many of the things that formerly were deemed essential are now unknown. In connection with the various items formerly called "requisites," and which still find employment in modern conveyancing, we may also

¹ See 2 Wash. Real Prop. 587; 2 Black. Com. 294.

² Deeds are now invariably construed as agreements between the parties; yet a deed-poll, in form, does not purport to be an agreement, but is rather a declaration of some particular person or persons, addressed to all mankind, and

informing them that the grantors have given to the grantees certain lands which they describe. The formal commencement is, "Know all men by these presents, that I," etc.

³ 2 Black. Com. 296.

⁴ Cruise, Dig., title 32, ch. II.

consider a number of matters which, while not strictly requisites, are certainly circumstances, and for the purpose of convenience all of these matters may be grouped under the general head of *incidents*. This will include the general form and arrangement of a deed; the parties thereto; the subject-matter of the grant; the covenants and conditions which may accompany it; the consideration which supports it; the circumstances relating to execution, acknowledgment, delivery and registration, and such minor incidents as may seem to require mention.

1. *Writing and Arrangement.*

General rules.—It is an old rule that while a deed may be expressed in any language or characters, it must be written on parchment or paper.¹ Indeed, Blackstone affirms that if written on any other material it will be no deed, and succeeding writers have continued to reiterate the statement. As a matter of fact, linen is now much used in some departments of conveyancing,² and no question has been raised as to its legality; and while the elementary writers have scrupulously adhered to the common-law direction regarding material, yet there can be no doubt that a valid deed may be written upon any durable material not liable to alteration or easily susceptible of erasure.

It is a further rule that there must be words sufficient to specify the agreement and bind the parties, and that same must be legally and orderly set forth.³ It would seem that the early deeds were extremely short, as suited the rude simplicity of the times; but as conveyancing grew more complicated, it became customary to divide them into several distinct parts. Much formality was formerly employed in framing a deed according to these conventional divisions,

¹ 2 Black. Com. 297; Cruise, Dig., title 32, ch. II. plats and subdivisions and the dedication of lands.

² Particularly in the matter of ³ Cruise, Dig., tit. 32, ch. II.

but custom has long since reduced the phrasing of these parts to comparatively brief clauses, while the legislatures of some states have practically abrogated all of the ancient formal parts.

The formal parts of a common-law deed are as follows:

The *premises*, which consists of the introductory part, including the date (although this is sometimes placed at the end), the parties, the consideration, recitals, the words of grant, the description, and exception, if any.

The *habendum*, which declares the estate or interest granted, although this may also be done in the premises.

The *tenendum*, which accompanies the *habendum*, and expresses the tenure of the estate.

The *reddendum*, or reservation to the grantor of some new thing in the land.

The *conditions*, or recitals qualifying, limiting or restricting the use and enjoyment of the estate.

The *covenants*, or collateral promises of the performance or non-performance of certain acts or agreements as to the existence or non-existence of certain things.

The *testimonium* or *conclusion*, reciting the fact of execution and the date, either expressly or by reference to the beginning.

This form of deed, with minor differences, depending on locality, was exclusively used in the United States for many years, and is still employed to a considerable extent. Within a comparatively brief period, however, an attempt has been made in a number of states to simplify the forms of conveyancing by statutory enactments prescribing a model or precedent for the ordinary deeds in common use and declaring their effect. The radical difference between these forms and those derived from the common law lies in the fact that they are entirely without *habendum*, and that the force and effect of the covenants, when the deed is intended to carry covenants, has been transferred to and merged in the operative words of grant.

2. *The Parties.*

Generally considered.—It is fundamental that to every valid grant there must be grantors competent to give¹ and grantees capable of taking.² If a conveyance of land has resulted as the effect of a preliminary treaty, and represents the consummation of a contract previously made and concluded, it must be the intelligent and capable act of the parties on either side; if it has been induced by other motives, or if the grantor has assumed to act without the actual concurrence of the grantee, it must still, so far as he is concerned, be the result of free will and a just comprehension of the nature and effect of what he has done. A grantor, therefore, to successfully accomplish the contractual undertaking expressed by a deed, must possess the mental capacity to give the necessary legal assent; should have attained the requisite legal age to render his engagements binding, and should rest under no disability depriving him of legal capacity. Possessed of these qualifications he may make any disposition of his property that his judgment, fancy or caprice may prompt, provided that in so doing he contravenes no rule of law or principle of equity.

While the law presupposes that every contract is the intelligent act of the parties to it, entered into upon a fair understanding of its purport and consummated with a knowledge of its effects, yet, in the conveyance of land, it often happens that the grantee is but a passive recipient, with no voice, and even without mind. The conveyance may have been none of his seeking, and at the time of its execution unknown to him; and while neither the burdens nor advantages of property can be thrust upon a person without his assent, yet, as the possession of property is so universally considered a benefit, the absence of express dissent is ordinarily presumed to indicate assent and concurrence.³

¹ Whitaker v. Miller, 83 Ill. 381.

³ Bundy v. Iron Co., 38 Ohio St.

² Garnett v. Garnett, 7 T. B. Mon. 300; Bivard v. Walker, 39 Ill. 413; (Ky.) 545; Douthitt v. Stinson, 63 Davenport v. Whitsler, 46 Iowa, Mo. 268. 287.

So, too, while it is essential to the validity of a conveyance that it be to a grantee capable of taking and of proper identification, yet far less strictness is observed with respect to capacity, etc., in case of grantees than in case of grantors, and few of the disabilities which encompass the latter are applicable to the former.

No person, however, can take a present estate under a deed unless named in same as a party, and the *habendum* can never introduce one who is a stranger to the premises to take as a grantee¹ (though he may take by way of remainder); yet, where the grantee's name has been omitted in the premises, if the *habendum* be to him by name, his heirs, etc., he takes as a party and the defect is cured.²

In the draughting of instruments it may sometimes happen, through inadvertence or mistake, that the name of the grantor has been entirely omitted in the body of the deed; and while it has been held that one who signs, seals and delivers a deed is bound by such acts as grantor, although not named as such therein,³ the current of later decisions would indicate that such a deed is ineffectual to convey any interest or pass title.⁴ Where only a portion of the grantors named in a conveyance sign and acknowledge same, the authorities are somewhat divided as to the effect of the deed. Some hold that where the deed shows that it was intended to be jointly executed by all the parties, an execution and delivery by a portion only is incomplete and does not bind them.⁵ A majority of the cases, however, favor the contrary doctrine, and seem to sustain the principle that the parties executing will be bound thereby, and the deed be sufficient to pass their interests.⁶

If the true owner of land conveys by any name, the con-

¹ Blair v. Osborne, 84 N. C. 417; Hornbeck v. Westbrook, 9 Johns. (N. Y.) 73.

² Lawe v. Hyde, 39 Wis. 346.

³ Elliott v. Sleeper, 2 N. H. 525; Thompson v. Lovrein, 82 Pa. St. 432.

⁴ Harrison v. Simmons, 55 Ala. 510; Laughlin v. Fream, 14 W. Va. 322; Peabody v. Hewitt, 52 Me. 33; Bank v. Rice, 4 How. 225.

⁵ Arthur v. Anderson, 9 S. C. 234. ⁶ Story, Part., § 119; Parsons, Part., § 369.

veyance, as between him and his grantee, will transfer title, and in all cases evidence *aliunde* is admissible to identify the actual grantor.¹

With respect to parties, considered in their contractual relations, they may be classed as (a) persons *sui juris*, or such as act independently and in their own right; (b) persons *under disability*, or such as are, by reason of their condition, legally incapacitated or disqualified to act; (c) persons *incompetent*, or such as lack natural capacity for intelligent action; and (d) *fiduciaries*, or such as act under a power for or on behalf of some other person. These classes will be briefly considered in their order.

(a) *Persons Sui Juris.*

Generally.—Under this head may be classed both natural persons and corporations, including all those who possess legal capacity to contract and are not affected by the disabilities hereafter mentioned. The rights, duties, powers and privileges of these persons receive incidental mention throughout the work, and nothing further is required in this connection beyond a passing allusion. We may with profit, however, briefly notice two species of this class.

Partners.—It is a rule, which admits of but few exceptions, that one partner, during the continuance of the partnership, has no power to convey the real estate of the firm either by deed or assignment; nor make any contracts in relation thereto specifically enforceable against the others; and, unless expressly authorized, deeds so made which profess to transfer the property of the absent partner or incur liabilities in regard to same are absolutely void as against the partner who did not join.²

¹ As where a deed purports to be from John O. Black, and is signed "J. O. Black," parol evidence is admissible to show that James O. Black was the identical person who in fact executed the deed. *Wakefield v. Brown*, 38 Minn. 361.

² *Ruffner v. McConnel*, 17 Ill. 212; *Jackson v. Sanford*, 19 Ga. 14; *Goddard v. Renner*, 57 Ind. 532. See page 43 for a statement of the partnership relation to real estate of the firm.

Nor will a conveyance to one partner, or to a firm in which but one partner is named, be effective to vest title in the firm. Thus, a deed to John Smith & Co. will, at law, have the effect of vesting title in John Smith alone,¹ a firm name not being a sufficient naming of the grantee. It has been held, however, that this may be regarded as a latent ambiguity which may be explained by parol,² and in equity the partner so taking would be treated as holding the legal title in trust for the partnership.

Corporations.—For the purposes of this article corporations may be classed as *municipal* and *private*; the former including all of the subdivisions and agencies of the state, the latter all companies and associations of individuals whether formed for *quasi*-public or strictly private purposes. Both of these classes, under general or special conditions, have the power to acquire, hold and transmit the title to real estate.

Corporations, though regarded in law as persons for certain purposes, are not entitled to the privileges of citizens³ as guarantied by the federal constitution, neither in the state of their creation, nor in other states which they may enter for the purpose of business. Their right to acquire and transmit property is a statutory one in the home state, and in another state is based upon the comity between the states. In the latter case it is a voluntary act of grace of the sovereign power,⁴ and is inadmissible when contrary to its policy or prejudicial to its interests.⁵ A corporation has only such powers

¹ Arthur v. Webster, 22 Mo. 378; Winter v. Stock, 29 Cal. 407; Gassett v. Kent, 19 Ark. 607; Barnet v. Lachman, 12 Nev. 361.

² Murry v. Blackledge, 71 N. C. 492.

³ Although a corporation is not a citizen within the several provisions of the constitution, yet where rights of action are to be enforced by or against a corporation, it will be considered as a citizen of the

state where it was created. Railway Co. v. Whitton, 13 Wall. 270. This, however, applies more particularly to controversies in the federal courts.

⁴ Ducat v. Chicago, 48 Ill. 172; Insurance Co. v. Commonwealth, 5 Bush (Ky.), 68; State v. Fosdick, 21 La. Ann. 434.

⁵ Carroll v. East St. Louis, 67 Ill. 568.

as its charter gives it, either expressly, or as incident to its existence; and in determining whether a given act is within the power of a corporation, it is necessary to consider, first, whether the act falls within the powers expressly enumerated in the charter or defined by law; and second, whether it is necessary to the exercise of one of the enumerated powers,¹ and these apply both to the acquisition and transfer of real property. Land which a corporation cannot hold in its own name it cannot hold in the name of another, and when a corporation cannot hold the legal title to land it cannot take a beneficial interest in it.²

Continued — Statutes of mortmain.— The common-law right of corporations to take and hold real estate has been restrained in England from an early day by a series of laws called *statutes of mortmain*, which were passed to repress the grasping and rapacious spirit of the church, which was absorbing in perpetuity the best lands in the kingdom. They were called statutes of mortmain because designed to prevent the holding of lands by the *dead clutch* of ecclesiastical corporations, which in early times were composed of members dead in law, and in whose possession property was forever dead and unproductive to the feudal superior and the public.³ This system of restraint, though originally confined to religious corporations, was subsequently extended to civil or lay corporations. The English statutes of mortmain,

¹ *Vandall v. Dock Co.*, 40 Cal. 83; *Pullan v. Railroad Co.*, 4 Biss. 35; *Weckler v. Bank*, 42 Md. 581; *Matthews v. Skinner*, 62 Mo. 329. In determining whether a corporation can make a particular contract, it must be considered whether its charter, or some statute binding upon it, forbids or permits it to make such a contract; and, if the charter and valid statutory law are silent upon the subject, whether the power to make such a contract

may not be implied on the part of the corporation as directly or incidentally necessary to enable it to fulfill the purpose of its existence, or whether the contract is entirely foreign to that purpose. *Weckler v. Bank*, 42 Md. 581; *Watson v. Water Co.*, 36 N. J. L. 195.

² *Coleman v. Railroad Co.*, 49 Cal. 517.

³ *Ang. & Ames on Corp.*, § 148. And see 1 *Black. Com.* 479.

though they have been held in some of the states to be the law, so far as applicable to their political condition, have not been re-enacted in this country; yet the policy has been retained and is manifest in the general and special enactments of every state.

Continued — Power of acquisition — User.— There is a broad distinction between the power of acquisition and the use to which the property is to be applied, and the effect of this distinction upon the rights of third persons is equally marked. Where the charter of a corporation, or the general law under which it is organized, prohibits the purchase of lands for any purpose, a deed to it would be an utter nullity, as its capacity to take is determined by the instrument or act which gave it existence;¹ but having the power to purchase and take, though for a specific purpose only, it becomes fully invested with title by a deed properly executed, even though the property be acquired and used for a purpose forbidden by the organic act.² As a rule, deeds to and from corporations are effective to convey the title, and title so derived cannot be impeached collaterally, nor its validity be questioned by third persons, on the ground that the transaction was beyond the corporate power; for where a corporation exceeds its powers, the remedy is by a direct action in the name of the state,³ which alone can interfere.⁴ Parties dealing with corporations are chargeable, however, with notice of the limitations imposed by the charter upon their powers.⁵

¹ *Leazure v. Hillegas*, 7 S. & R. Kelly v. Transportation Co., 3 Oreg. (Pa.) 319. Yet whether real estate 189.

has been acquired in excess of the corporate powers to take and hold cannot be made a question by any party except the state, who alone must assert her policy in that regard. *Alexander v. Tolleston Club*, 110 Ill. 65; *Baker v. Neff*, 73 Ind. 68. ⁴ *De Camp v. Dobbins*, 29 N. J. Eq. 36; *Hayward v. Davidson*, 41 Ind. 214. The doctrine of *ultra vires* is generally applied only to such contracts as remain wholly executory. *Thompson v. Lambart*, 44 Iowa, 239.

² *Hough v. Land Co.*, 73 Ill. 23.

⁵ *Franklin Co. v. Lewiston Inst.*

³ *Smith v. Sheeley*, 12 Wall. 358; for Savings, 68 Me. 43.

Continued—Municipal corporations.—Municipal corporations are creatures of the statute, and can exercise only such powers as are expressly conferred, or such as arise, by implication, from general powers granted. Where the charter empowers a municipal corporation to buy and hold real property, it must be understood to be purchases made in the ordinary way, and for corporate purposes only; and a grant to purchase for particular purposes would seem to be a limitation on the power of such corporations, and to exclude, by necessary implication, all purchases for mere speculation and profit.¹ Municipal corporations, under a general grant of power to buy and hold land, may purchase within the corporate limits such property as may be necessary for corporate purposes, and may even buy and hold real estate beyond the corporate limits, for the location of cemeteries, pest-houses, etc.;² but in the absence of any enabling statute, cannot become the purchaser of lands for speculative purposes.

Continued—Corporations as grantees.—By common law, and in the absence of statutory prohibitions, corporations aggregate, in whatever manner created, can take, like natural persons, by every method of conveyance known to the law.³ No particular words of grant are necessary, other than those in common use in conveyances to natural persons; though it is usual to insert, as a word of limitation, the term "successors." The word is not necessary, however, to convey a fee-simple, independent of the statute which provides for a fee, unless restrained by express terms or necessary implication; for, admitting that such a grant be strictly only

¹ *City of Champaign v. Harmon*, 98 Ill. 491. And see 2 Dill. Mun. Corp., § 433.

² 2 Dill. Mun. Corp., § 435. The general rule is that municipal corporations cannot purchase or hold real estate beyond their territorial limits, unless this power is con-

ferred by the legislature. 2 Dill. Mun. Corp., § 435. And see *Denton v. Jackson*, 2 Johns. Ch. 336; *Chambers v. St. Louis*, 29 Mo. 543.

³ *Am. Bible Society v. Sherwood*, 4 Abb. (N. Y.) App. 227; *Ang. & Ames, Corp.*, § 140.

a life estate, yet as the corporation, unless of limited duration, never dies, such estate for life is perpetual, or an equivalent to a fee-simple, and therefore the law allows it to be one.¹

Continued — Corporations as grantors.— All private corporations have an incidental right to alien or dispose of their lands, without limitation as to objects, unless restrained by the act of incorporation or by statute; and the power to mortgage, when not expressly given or denied, will be regarded as an incident to the power to acquire and hold real estate and to make contracts concerning same.² In general, they convey their land in the same manner as individuals, the laws relating to the transfer of property being equally applicable to both,³ and the only features that particularly distinguish this class of conveyances from individual deeds are in the execution and acknowledgment.

(b) *Persons Under Disability.*

Aliens.— By the law of nations, a contract between a citizen and an alien enemy is void;⁴ and this applies to conveyances of land as well as other forms of contract.⁵ So, too, it was formerly held to be against public policy to allow any person owing no allegiance to the government to own lands within its jurisdiction; and this doctrine still finds a recognition in some form in a number of states.⁶

The rule of the common law permits an alien to take land by purchase,⁷ either deed or devise,⁸ and to hold it against

¹ Overseers v. Sears, 22 Pick. (Mass.) 122; Congregational Society v. Stark, 34 Vt. 243; Ang. & Ames on Corp., § 141; 2 Black. Com. 109.

² Agricultural Society v. Pad-dock, 80 Ill. 263.

³ Ang. & Ames on Corp., § 193.

⁴ Brooke v. Filer, 53 Ind. 402; Fisher v. Kurtz, 9 Kan. 501.

⁵ Dillon v. United States, 5 Ct. of Cl. 586; but compare Shaw v. Car-

lile, 9 Heisk. (Tenn.) 594; Conrad v. Waples, 96 U. S. 290.

⁶ See 1 Warvelle on Vendors, 70, for a discussion of this subject.

⁷ Doe v. Robertson, 11 Wheat. (U. S.) 332; Montgomery v. Dorion, 7 N. H. 475; Smith v. Zaner, 4 Ala. 99.

⁸ Fox v. Southack, 12 Mass. 143; Guyer v. Smith, 22 Md. 239.

all persons but the state;¹ and, as the disabilities of the alien rest upon the fact of alienage and not upon his character, there is practically no distinction in this respect between an alien friend and an alien enemy.² The title held by him is not subject to collateral attack,³ and may be sold and conveyed before any action taken by the state; and in such event the purchaser will hold same in all respects as though the conveyance had been made by a citizen.⁴

In a majority of the states, however, an alien is not distinguished from a citizen, so far as respects his rights of property, and his ability to make and enforce contracts in regard to same, and, generally, for the protection of his rights or the redress of his wrongs, he stands on the same-ground as the citizen — equal before the law.

Infants.—The age of legal competency has been generally fixed by statute at twenty-one years, although a departure from this rule is observed in some states in the case of females, who are permitted to attain majority at the age of eighteen years. As a general rule, persons who have not reached the statutory age above mentioned are disabled from entering into enforceable contracts. Under this rule a contract by a minor for the purchase or sale of real estate cannot be enforced against him after attaining majority, and the same reasons that permit the infant to repudiate his executory contracts allow him to disaffirm such as have been executed, and no conveyance from him during his minority will be binding upon him after he arrives at age.⁵ During the interval between the execution of the instrument and the attainment of majority, the contract or conveyance can

¹ *Ramires v. Kent*, 2 Cal. 558; ⁴ *Halsted v. Commissioners*, 56 Phillips v. Moore, 10 Otto (U. S.), Ind. 363; *Montgomery v. Dorion*, 7 208; *Scanlan v. Wright*, 13 Pick. N. H. 475.
(Mass.) 533.

² *Read v. Read*, 5 Call (Va.), 207; *Cummings v. Powell*, 8 Tex. 80; *Stephens' Heirs v. Swann*, 9 Leigh Green v. Green, 69 N. Y. 553; *Kline v. Beebe*, 6 Conn. 494.
(Tenn.), 404.

³ *Norris v. Hoyt*, 18 Cal. 217.

⁵ *Harrod v. Meyers*, 21 Ark. 592;

neither be said to be valid or void; nor can any act of his impart to it either character. It is simply voidable, and so remains until he shall decide the question for himself after he becomes of age.¹

The deed of an infant, however, is by no means inoperative, and will suffice to transmit title with all of its incidents.² If he takes no steps to avoid it during the period allowed by law, the title will become unassailable for this cause; and while mere acquiescence during this period cannot be construed into a confirmation,³ there are many cases where this, in connection with other circumstances, has been held to establish a ratification.⁴ Where no specific time is fixed by statute, and this is the case in most of the states, it has, in a number of instances, been held that silent acquiescence, unaccompanied by other circumstances, for any shorter period than that prescribed by the statute of limitations would be insufficient to bar the right of disaffirmance;⁵ but, on the other hand, a large and equally well-considered class of cases maintains that, if the infant intends to avoid or disaffirm, he must make his election within a reasonable time after the removal of his disability;⁶ and while specific performance will not usually be enforced against one out of possession, yet, if after coming of age he has entered or continues to hold and enjoy the property, or has received benefits therefrom, it will amount to confirmation on his part, and he will not be permitted to avoid the sale and refuse payment or reclaim the consideration already paid.⁷

¹ *Dunton v. Brown*, 31 Mich. 182;
Keil v. Healy, 84 Ill. 104.

² *Irvine v. Irvine*, 9 Wall. (U. S.)
 617; *Worcester v. Eaton*, 13 Mass.
 371.

³ *Boody v. McKenny*, 23 Me. 517;
Prout v. Wiley, 28 Mich. 164;
Vaughn v. Parr, 20 Ark. 600.

⁴ See *Hartman v. Kendall*, 4 Ind.
 405; *Ferguson v. Ball*, 17 Mo. 374;
Bostwick v. Atkins, 3 N. Y. 53.

⁵ *Peterson v. Laik*, 24 Mo. 541;
Hale v. Gerrish, 8 N. H. 374; *Mc-*
Murry v. McMurry, 66 N. Y. 175.

⁶ *Thompson v. Boyd*, 13 Ala. 419;
Hastings v. Dollarhide, 24 Cal. 195;
Harris v. Cannon, 6 Ga. 382; *Blank-*
enship v. Stout, 25 Ill. 132.

⁷ *Robbins v. Eaton*, 10 N. H. 561;
Boyd v. McKenny, 23 Me. 517; *De-*
lano v. Blake, 11 Wend. (N. Y.) 85;
Callis v. Day, 38 Wis. 643.

It must further be observed that the privilege of infancy is not in all respects personal to the infant; and contracts, grants or deeds by a matter in writing, and which take effect by delivery of his hand, are voidable not only by himself during his life-time, but also by his heirs, or those who have his estate, after his decease; and his heirs may exercise the same rights of disaffirmance within the same time that the infant himself might if living.¹

Married women.—It was among the earliest formulated rules of the common law that the legal existence of a woman upon her marriage became suspended, and thenceforward during the coverture was merged entirely in that of the husband. As a consequence she was without capacity to take or hold real estate or to make any valid contracts in respect to same, and all her property became vested in the husband.² Equity early intervened to mitigate the severity of this rule, and the progressive spirit of the age did much to relax it, until finally legislation, reflecting the enlightenment of the times, abolished it altogether. The prevailing doctrine now is that coverture imposes no disability, and that a married woman has the same freedom of action and contractual ability as though she were sole.³

(c) *Persons Incompetent.*

Lunatics.—Persons of unsound mind, when such unsoundness amounts to an incapacity to understand and act in the ordinary affairs of life, have always been held incapable of making a valid contract.⁴ Yet, while this is the recognized doctrine, it by no means furnishes a conclusive rule for the

¹ Land & Loan Co. v. Bonner, 75 Ill. 315; Breckenridge v. Ormsby, 1 J. J. Marsh. (Ky.) 248; Austin v. Charleston Seminary, 8 Met. (Mass.) 203; but compare Jackson v. Burchin, 14 Johns. (N. Y.) 127.

² 1 Black. Com. 126; 2 Kent, Com. 103.

³ See Price v. Osborn, 32 Wis. 34; Westlake v. Westlake, 34 Ohio St. 621.

⁴ Powell v. Powell, 18 Kan. 371; Van Deusen v. Sweet, 51 N. Y. 378; Dexter v. Hall, 82 U. S. 9.

decision of all questions growing out of the contracts or deeds of demented persons. The circumstances attending particular cases have much to do with the application of the doctrine. Insanity is a mysterious disease, sometimes affecting the mind only in its relation to or connection with a certain subject, leaving it sound and rational as to others, and many insane persons drive as thrifty a bargain as the shrewdest business man, without betraying in manner or conversation the faintest trace of mental derangement. It would be manifestly unjust, therefore, that such persons should be allowed to retain the property of innocent parties, or to retain their own property and its price;¹ and hence it may be said that where a purchase has been made from an insane person, and a deed of conveyance obtained in perfect good faith, before an inquisition and finding of lunacy, and with no knowledge of such lunacy on the part of the purchaser, and if the transaction has been in all other respects fair and reasonable, with no advantage taken by the purchaser, and if the conveyance was for a sufficient consideration, which was received by the lunatic, if the parties cannot be restored to their original positions, it will not be set aside.² This results, not because the contract was valid and binding, but rather for the reason that an innocent party, without fault or negligence, would be prejudiced by setting it aside. Both parties, in such a case, are faultless, and therefore stand equal before the law; and in the forum of conscience the law will not lend its active interposition to effectuate a wrong or prejudice to either, but will suffer the misfortune to remain where nature has cast it.³

The deed of a lunatic is not void, but, like that of other persons incompetent or disabled, voidable only, and is effectual to pass title with all its incidents if unassailed.

¹ *Bank v. Moore*, 78 Pa. St. 407; *Freed v. Brown*, 55 Ind. 310; *Young v. Stevens*, 48 N. H. 133. *v. Stevens*, 48 N. H. 133.

² *Behrens v. McKenzie*, 23 Iowa, 333; *Scanlan v. Cobb*, 85 Ill. 296; ³ See remarks of Cole, J., in *Allen v. Berryhill*, 27 Iowa, 534.

Imbeciles.— Mere weakness of mind, when unaccompanied by any circumstances showing imposition or undue advantage,¹ forms no objection to the validity of a contract, for the law does not graduate intellectual differences on a nicely adjusted scale; nor does it seem that partial insanity or monomania,² unless it exists with reference to the contract, will create incapacity unless coupled with other circumstances. That the mental powers have been somewhat impaired by age is not sufficient to invalidate a deed,³ unless it can be shown that the purchaser took an unfair advantage of the vendor's mental condition; and if he be still capable of transacting his ordinary business, and understands the nature of the business in which he is engaged and the effect of what he is doing, and can exercise his will with reference thereto, his acts will be valid and binding.⁴

Transactions with persons of feeble mind are always subject to close scrutiny, however, and, unlike those between parties of unimpaired mental faculties, will be set aside on slight grounds after the disability has been shown to exist.⁵

Persons born deaf and dumb are, by the common law, deemed *non compos mentis*, and without sufficient understanding to know and comprehend their rights and liabilities. The improved methods of educating such persons adopted at the present day develop in them a higher degree of intelligence, however, than it was formerly supposed they possessed, and to some extent has modified the ancient rule. Yet as the want of hearing and speech must necessarily prevent a full development of their intellectual power, and place them at a great disadvantage in their dealings with others, the law throws around them for their protection the presumption of incapacity to manage their own affairs until the contrary is shown.⁶

¹ Mann v. Betterly, 21 Vt. 326; Beverly v. Walden, 20 Gratt. (Va.) Young v. Stevens, 48 N. H. 133; 147.

Cain v. Warford, 33 Md. 23.

⁴ English v. Porter, 109 Ill. 285.

² Burgess v. Pollock, 53 Iowa, 273.

⁵ Wray v. Wray, 32 Ind. 126; Cadwallader v. West, 48 Mo. 483.

³ Lindsey v. Lindsey, 50 Ill. 79;

⁶ Oliver v. Berry, 53 Me. 206;

Drunkards.—Intoxication does not of itself render a contract void or relieve the contracting parties from its consequences.¹ Were it otherwise, drunkenness, it is said, would be the cloak of fraud. Yet, under certain circumstances, a transaction may be avoided for this reason.

To avoid responsibility, however, on the ground of intoxication, the proof of mental incapacity must be very clear and convincing;² for a drunkard is not incompetent in the same sense as an idiot or one generally insane;³ and the proof must show that at the time of the act in question his understanding was clouded or his reason dethroned by actual intoxication.⁴

When a man has been found an habitual drunkard by a legal inquisition, and his property placed in the hands of a conservator or committee, all business relating to the drunkard's estate must be transacted with such conservator or committee until the proceeding has been annulled or set aside.⁵ The fact that the drunkard has sober intervals in no way alters the case, and during such intervals he has no more authority to deal with or dispose of his property than while he is in a state of intoxication; nor will the further fact that the other contracting party acted in good faith and with no actual notice of the inquisition confer upon him any additional rights or furnish ground for equitable relief.⁶

(d) *Fiduciaries.*

Generally considered.—A very large proportion of the sales of real estate in the United States are made through the media of fiduciaries and trustees. Such fiduciaries include not only trustees proper, but all who act under a

Brower v. Fisher, 4 Johns. Ch. (N. Y.) 441.

¹ Bates v. Ball, 72 Ill. 108; Joest v. Williams, 42 Ind. 565; Broadwater v. Darne, 10 Mo. 277.

² Bates v. Ball, 72 Ill. 108.

³ Van Wyck v. Brasher, 81 N. Y. 260.

⁴ Gardner v. Gardner, 22 Wend. (N. Y.) 526; Johns v. Fritchey, 39 Md. 258.

⁵ Redden v. Baker, 86 Ind. 195.

⁶ Wadsworth v. Sharpsteen, 8 N. Y. 388.

power, as mortgagees, executors, guardians, etc.; and the same general principles are equally applicable to all of the different classes and relations.

Fiduciaries and trustees, if they exceed and violate their authority, are responsible, though no bad faith prompted their acts; and those who deal with them on the faith of the trust estate must be aware that they exercise only limited and delegated powers, and are bound, at their peril, to take notice of such powers and see to it that they confine themselves within their scope.¹

Trustees.—A *trustee* is one in whom some estate, interest or power in or affecting property of any description is vested for the benefit of another. Though the name is technically applied to a particular class, it also, to a certain extent, comprises executors, administrators, guardians, assignees, etc.

A trustee cannot profit by his trust estate, nor become a purchaser at any sale thereof by him,² while the power under which he acts must in all cases be strictly pursued to render his act valid.³ A joint power of sale must be executed by all, provided all are living and in condition to act,⁴ unless the instrument creating the trust provides otherwise;⁵ for the interest held by several trustees is an entirety, and can only pass as a whole; hence, all the trustees living, having an interest in the property, must join in the conveyance, otherwise it will be wholly inoperative.⁶ But in case of the death of one or more of the trustees, the survivor or survivors will hold the trusts and may execute the powers.⁷ A deed by the survivors, representing the entire title, will be

¹Owen v. Reed, 27 Ark. 122; Ventres v. Cobb, 105 Ill. 33.

²Terwilliger v. Brown, 44 N. Y. 237. This is the universally accepted doctrine, but is subject to some qualifications, the law not exacting the same rigid degree of strictness in all the states. Clark v. Clark, 65 N. C. 655.

³Huntt v. Townshend, 31 Md. 336.

⁴Learned v. Welton, 40 Cal. 349.

⁵Gould v. Mather, 104 Mass. 283.

⁶Golder v. Brewster, 105 Ill. 419; Brennan v. Wilson, 71 N. Y. 502.

⁷Lane v. Debenham, 11 Hare, 188.

good, even though they are authorized to fill the vacancy, as it is only where the terms of the power creating the trust imperatively require the vacancy to be filled that the acts of the survivors will be invalid.¹

Where the legal title of a trustee is created by the owner of the property, the right of the trustee to enforce it will be recognized everywhere; but where such title is derived solely from some act of the law, the effect of that act is confined to the territorial jurisdiction over which the law extends.² Upon the death of a sole trustee, the legal estate devolves upon his heir at law; and the heir takes the same estate, and is subject to exactly the same duties and responsibilities, as his ancestor.³

Being founded on personal confidence, it necessarily results that a trustee cannot delegate his trust to others,⁴ and is himself responsible for the acts of all his subordinates in whatever character they may act.⁵

Executors and administrators.—The real estate of deceased persons is frequently conveyed through the media of what are known as “personal representatives,” consisting of *executors*, or persons specifically designated for that purpose by the decedent, and *administrators*, who act by virtue of an appointment under the law.⁶ In both cases they stand

¹ *Golder v. Brewster*, 105 Ill. 419.

² *Curtis v. Smith*, 6 Blackf. (Ind.) 537.

³ *Watkins v. Specht*, 7 Coldw. (Tenn.) 585; *McMullen v. Lank*, 4 Houst. (Del.) 648. By force of the statute the trust sometimes vests in some tribunal in the county in which the real estate is situated, which, upon the application of some person interested in the trust, forthwith appoints a successor to the deceased trustee, whereupon the trust vests in the newly-appointed trustee. *Collier v. Blake*, 14 Kan. 250.

⁴ *Grover v. Hale*, 107 Ill. 638. But where the trustee conveys the legal title to one having knowledge of the trust, or where such other person in any manner acquires the legal estate with such knowledge, he holds the property subject to the trust, and may be compelled, in equity, to execute it. *Ryan v. Doyle*, 31 Iowa, 53; *Smith v. Walser*, 49 Mo. 250.

⁵ *Moorecroft v. Dowding*, 2 P. Wms. (Eng. Ch.) 314.

⁶ “Legal” or “personal” representative, in the commonly accepted sense, means administrator

in the position of trustees of those interested in the estates upon which they administer. An executor may sell and convey lands held in special trust without the intervention of a court, but not such lands as are sold in due course of administration to pay decedent's debts; while an administrator can do no act affecting lands without special orders of a court. In case of sales by either officer, no title passes until the execution and delivery of a deed,¹ and without such title as the deed conveys the purchaser cannot maintain or defend ejectment against or by the heir.²

Guardians.—The law permits conveyances by guardians, conservators, committees, etc., of the real estate of their wards whenever the sale of such property may be necessary or expedient for the payment of debts, the support of the ward, an investment of the proceeds, or other similar conditions. Such property can only be sold, however, under the order of a court of competent jurisdiction, and a confirmation after sale is necessary to give it validity.³ A conveyance by the guardian in any other manner is unauthorized; and where one purchases the real estate of a ward from a guardian, directed by order of court to sell it, notwithstanding he takes a deed from such guardian, if the sale is never reported to or confirmed by the court he cannot maintain his title against a subsequent conveyance by the ward after the termination of his wardship.⁴

Legal officials.—The conveyances of sheriffs, commissioners, masters in chancery, etc., are executed in a ministerial capacity, but for practical purposes they may be regarded as one class of fiduciaries, and to them the same general rules apply as govern other fiduciary relations.

or executor. But this is not the only definition. It may mean heirs, next of kin, or descendants. *Warnecke v. Lembea*, 71 Ill. 91.

¹ A properly conducted sale, after confirmation vests the equitable title in the purchaser.

² *Doe v. Hardy*, 52 Ala. 291; *Gridley v. Phillips*, 5 Kan. 349.

³ *People v. Circuit Judge*, 19 Mich. 296; *White v. Clawson*, 79 Mich. 188; *Chapin v. Curtenius*, 15 Ill. 427.

⁴ *Titman v. Riker*, 10 Atl. Rep. 397.

3. *The Consideration.*

Generally considered.—The motive or inducement for a conveyance is termed a *consideration*. This may be either *good* or *valuable*; the former may consist of anything of merit, as the love and affection which a man bears to his kindred;¹ the latter consists of money or its equivalent—something that possesses a known value² or is capable of pecuniary measurement.³ The consideration may be *express*, as where the motive or inducement of the parties to the deed is distinctly declared, or *implied*, as in cases where the law presumes an adequate compensation.⁴ Where the deed is made without consideration it is said to be *voluntary*.

Effect of consideration.—No consideration was required in conveyances under the common law, the homage and fealty incident to the same being deemed sufficient, but became necessary under the statute of uses.⁵ As a general proposition, any valuable consideration, acknowledged or proved, is sufficient to sustain a conveyance of lands;⁶ and the acknowl-

¹Story, Eq. Jur., § 354; Cruise, Dig., title 32, ch. II.

²Cruise, Dig., title 32, ch. II; Kittridge v. Chapman, 36 Ia. 348; Haughwout v. Murphy, 21 N. J. Eq. 118; Savage v. Hazard, 11 Neb. 327; Wood v. Beach, 7 Vt. 522.

³Brown v. Welch, 18 Ill. 343; Palmer v. Williams, 24 Mich. 328; Busey v. Reese, 38 Md. 264.

⁴Cruise, Dig., title 32, ch. II.

⁵At the present time the only practical operation of the expression of a consideration, or the introduction of a clause reciting a consideration, is to prevent a resulting trust to the grantor and estop him from denying the making and effect of it for the uses therein declared. Meeker v. Meeker, 16 Conn. 383; Goodspeed

v. Fuller, 46 Me. 141; Graves v. Graves, 29 N. H. 129. Thus in Plowden it is said, *arguendo*, that by the law of England there were two ways of making contracts for lands or chattels; the one by words, the other by writing; and because words were often spoken unadvisedly and without deliberation, the law had provided that a contract by words should not bind without consideration. But when the agreement was by deed, there was more time for deliberation; for which reason deeds were received as a lien final to the party, and were adjudged to bind him, without examining upon what cause or consideration they were made. Plowd. 308.

⁶Jackson v. Leek, 19 Wend. 339.

edgment in the deed of payment of same is so far conclusive of the fact as to give effect to the conveyance.¹ A deed executed by the party in whom title is vested, and expressing a valuable consideration, never needs, as against him or those claiming under him, or as against a stranger, to be supported by showing what other reason, in addition to the will of the party, led to its execution.² Nor is it essential to the validity of a conveyance that the consideration should be expressed,³ and a deed, if properly drawn, will pass the title, whatever it may be, without reference to the consideration paid.⁴

Ordinarily, where parties contract by deed a consideration will be implied from the seal,⁵ which as a rule imports consideration;⁶ and it has been held that an instrument in form a conveyance and duly signed, whether under seal or not, imports a consideration;⁷ while a voluntary conveyance, without any consideration, either good or valuable, is valid and binding between the parties and their privies.⁸

As against the grantor and those in privity with him, the acknowledgment in the deed of payment is his receipt or admission, which on proof of the deed will be considered as proved.⁹ Such acknowledgment, however, is not conclusive, being merely by way of recital;¹⁰ and though it affords *prima facie* evidence of the fact, yet for the purpose of recovering

¹ Ochiltree v. McClurg, 7 W. Va. 232.

² Rockwell v. Brown, 54 N. Y. 210; Merrill v. Burbank, 23 Me. 538.

³ Jackson v. Dillon, 2 Overt. (Tenn.) 261; Wood v. Beach, 7 Vt. 522; Boynton v. Rees, 8 Pick. (Mass.) 329.

⁴ Fetrow v. Merriweather, 53 Ill. 278; Laberee v. Carleton, 53 Me. 211.

⁵ Ross v. Sadgbeer, 21 Wend. 166; Evans v. Edwards, 26 Ill. 279; Croker v. Gilbert, 9 Cush. (Mass.) 130.

⁶ Hunt v. Johnson, 19 N. Y. 279; Croft v. Bunster, 9 Wis. 503; Bush v. Stevens, 24 Wend. (N. Y.) 256.

⁷ Ruth v. King, 9 Kan. 17. This in the absence of statutory requirements to the contrary.

⁸ Fouby v. Fouby, 34 Ind. 433; Wallace v. Harris, 32 Mich. 380; Laberee v. Carleton, 53 Me. 211.

⁹ Bayliss v. Williams, 6 Coldw. (Tenn.) 440.

¹⁰ Huebsch v. Scheel, 81 Ill. 281; Parker v. Foy, 43 Miss. 260; Webb v. Peele, 7 Pick. 247.

the consideration, the grantor may still show that it was never, in fact, paid,¹ but not to invalidate or defeat the operation of the deed.²

As against the creditors of the grantor such recital is but hearsay, and no evidence of the fact of payment;³ but no one except a creditor can avail himself of the objection that the deed was given without consideration.⁴

Whenever a deed is assailed by one who claims a right or interest in the property conveyed, adverse to the grantee, it must, to insure validity, be supported by an adequate consideration. "Good" considerations, although meritorious, are not usually permitted to be effective in such cases; and, as a rule, to maintain a deed against the attack of creditors, owners of prior equities, etc., it must be founded upon some consideration which the laws deems valuable, and which is in some fair measure commensurate with the value of the land.⁵

4. *The Subject-matter.*

Generally considered.—By the ancient rules of conveying the first "circumstance"⁶ to a valid deed is that there be *persons* able to contract and be contracted with, for the purposes of the deed, and a thing or *subject-matter* to be contracted for; in modern times this rule is paraphrased to read: that to every valid grant there must be a *grantor*, a *grantee*, and a *thing granted*. The parties to a conveyance have already been noticed, and it remains now to briefly consider the subject-matter or the main ingredient of every deed.

¹ Barter v. Greenleaf, 65 Me. 405; Mass. 99; Houston v. Blackman, 66 Paige v. Sherman, 6 Gray (Mass.), Ala. 559.
511; Grout v. Townsend, 2 Hill (N. Y.), 554.

⁴ Hatch v. Bates, 54 Me. 136.

² Bassett v. Bassett, 55 Me. 127; (Mass.), 454; Hutchinson v. Hutchinson, 46 Me. 154; Doe v. Horn, 1 Newell v. Newell, 14 Can. 206; Richardson v. Clow, 8 Ill. App. 91.

Ind. 393; Ruth v. Ford, 9 Kan. 17.

³ Redfield Mfg. Co. v. Dysart, 62 Pa. St. 62; Rose v. Taunton, 119

⁶ See Cruise, Dig., tit. 32, ch. II.

While it is customary, and not altogether improper, to speak of the land as the subject of the conveyance, yet in strict legal contemplation it is the grantor's rights and interests therein, as comprehended in the generic term "estate," that is actually transferred. But as such rights and interests carry with them a dominion over the soil to which they relate, we may properly regard the subject-matter of a conveyance in a twofold aspect, and in this article the same will be considered (a) with respect to the *land* conveyed, and (b) with respect to the *estate* conveyed.

(a) *The Land Conveyed.*

General principles.—Reference has been made in a former chapter to the parceling or dividing of lands, whereby the definite bounds of ownership may be fixed and established. The parcel, as previously explained, is determined by running lines in conformity with legal rules, and the contents of the area bounded by these lines forms the subject of the conveyance. The enumeration of the courses and distances used in the measurement of the tract is called the *description*. The object of a description, in a deed, is to define what the parties respectively intend, the one to convey and the other to receive, by such deed; and this intention is to be deduced from the instrument, as in the case of any other contract.¹

Every deed of conveyance, in order to transfer title, must, either in terms or by reference or other designation, give such description of the subject-matter intended to be conveyed as will be sufficient to identify the same with reasonable certainty.² It is not essential, however, that the deed should on its face ascertain the limits or quantity of the estate granted or the particular property conveyed; but it will be sufficient if it refers to certain known objects or things, and provides definite means by which the same may

¹ Long v. Wagoner, 47 Mo. 178; Berry v. Derwart, 11 Reporter, 195; Kimball v. Semple, 25 Cal. 440. Long v. Wagoner, 47 Mo. 178.

² Whitaker v. Miller, 83 Ill. 381;

be readily ascertained and known;¹ and where words of general description only are used, oral evidence may be resorted to for the purpose of ascertaining the particular subject-matter to which they apply.²

Any description adopted by which the identity of the premises intended to be conveyed is established will be sufficient,³ and a description not sufficiently certain in itself may be made so by reference to other deeds in which it is sufficient.⁴ In the absence of references or other identifying circumstances, if the land be so inaccurately described as to render its identity wholly uncertain, the grant is void;⁵ and the same rule applies with equal force to exceptions or reservations from the grant, which, though the grant may prevail, the exceptions may be void for uncertainty.⁶

Rules of construction.—The location of land, as gathered from the description, is governed (1) by natural objects or boundaries, such as rivers, lakes, mountains, etc.; (2) by artificial devices, such as marked trees, stakes, stones, etc., and (3) by course and distance.

It is a general rule of construction that, in the description of land, the least certain and material parts must give way to the more certain and material. Quantity is never allowed to control courses and distances,⁷ and courses and distances must yield to fixed monuments and natural objects also referred to therein.⁸ But where the monuments, if once existing, are gone, and the place where they originally stood cannot be ascertained, the courses and distances when ex-

¹ *Coats v. Taft*, 12 Wis. 388; *Campbell v. Johnson*, 44 Mo. 247; *Dwight v. Packard*, 49 Mich. 614. *Dickins v. Barnes*, 79 N. C. 490.

² *Coleman v. Improvement Co.*, 94 N. Y. 229. ⁶ *Thayer v. Torrey*, 37 N. J. L. 339.

³ *Smith v. Crawford*, 81 Ill. 296; *Bishop v. Morgan*, 82 Ill. 352; *Saunders v. Schmaelzle*, 49 Cal. 59.

⁴ *Russell v. Brown*, 41 Ill. 184; ⁸ *Dupont v. Davis*, 30 Wis. 170; *Sanders v. Eldridge*, 46 Iowa, 34; *Credle v. Hays*, 88 N. C. 321. *Cunningham v. Curtis*, 57 N. H. 157.

⁵ *Calcord v. Alexander*, 67 Ill. 581;

plicit must govern;¹ and where the boundaries are doubtful, quantity often becomes a controlling consideration.² Nor will the rule that monuments, natural or artificial, rather than courses and distances, control in the construction of a conveyance be enforced when the instrument would thereby be defeated, and when the rejection of a call for a monument would reconcile other parts of the description and leave enough to identify the land.³ Where a deed calls for a natural object and the line gives out before reaching it, the line must be extended to the natural object, and the distance disregarded;⁴ but where no monuments are referred to, and none are intended to be afterward designated, the distance stated in the grant must govern the location.⁵ An erroneous description of land by numbers will not control other descriptive particulars which indicate the land with certainty.⁶

Where, as is often the case, the conveyancer, from an over-anxiety to identify the property, makes two descriptions, the one, as it were, superadded to the other, one description being complete and sufficient in itself, the other incorrect, the incorrect description, or feature, or circumstance, may be rejected as surplusage, and the complete and correct description allowed to stand alone.⁷

It must be remembered, however, that, notwithstanding the utmost liberality is allowed in the construction of descriptions, so as, if possible, to effectuate the intention of the parties, nothing passes by a deed except what is described in it, whatever the intention of the parties may have been, and extrinsic evidence is inadmissible to make the deed operate upon land not embraced in the descriptive words.⁸

¹ *Drew v. Smith*, 46 N. Y. 204;
Clark v. Wethy, 19 Wend. 320.

² *Winans v. Cheny*, 55 Cal. 567.

³ *White v. Luning*, 93 U. S. (3 Otto), 515.

⁴ *Strickland v. Draughan*, 88 N. C. 315.

⁵ *Negbauer v. Smith*, 44 N. J. L. 72.

⁶ *Bradshaw v. Bradbury*, 64 Mo. 334; *Montgomery v. Johnson*, 31 Ark. 62.

⁷ *Kruse v. Wilson*, 79 Ill. 233; *Meyers v. Ladd*, 26 Ill. 415; *Wade v. Deray*, 50 Cal. 376; *Credle v. Hays*, 88 N. C. 321.

⁸ *Coleman v. Improvement Co.*, 94 N. Y. 229.

Boundary lines — Highways.— It is a general rule that a grant of land bounded by a street or highway, whether the same be public or private, carries the rights of ownership to the middle of the way; and such is the established presumption governing the construction of deeds, in the absence of controlling words.¹ Nor does it seem essential, in order to carry a grant to the center of a highway, that the land should even be described as abutting or bounding thereon; and whenever land is sold bordering on a highway, the mere fact that it is not so described in the deed will not vary the construction. The grantee will still take the fee to the middle of the highway on the line of which the land is situated.²

It has been stated, as a reason for the rule, that the adjoining proprietors are presumed to have originally furnished the land in equal proportions for the sole purpose of a highway;³ and hence in a grant of the adjacent land the soil to the center of the highway passes as a part of the land and not as an appurtenant.⁴ Ordinarily the ownership of the soil of the street or road is of no practical use to the grantors of the adjacent property; and usually there is no purpose to be served in the retention by them of narrow strips or gores of land between the land conveyed and that of other proprietors, while for many purposes such ownership is of special importance to the purchaser.⁵ It is presumed, therefore, that the grantor's land in a street passes under the general description in his deed of the adjoining land with which it is connected or to which it belongs as a part of the same tract, subject to the public easement.⁶

¹ Newhall v. Ireson, 8 Cush. N. Y. 251; Taylor v. Armstrong, 24 (Mass.) 595; Champlain v. Pendleton, 13 Conn. 23; Buckman v. Buckman, 12 Me. 463; Moody v. Palmer, 50 Cal. 37.

⁴ Bissell v. Railroad Co., 23 N. Y. 54.

² Gear v. Barnum, 37 Conn. 229; Stark v. Coffin, 105 Mass. 328; Hawesville v. Lander, 8 Bush (Ky.), 679.

⁵ Re Robbins, 34 Minn. 99.

³ See Durham v. Williams, 37

⁶ Gould v. Railroad Co., 142 Mass. 85; Paul v. Carver, 26 Pa. St. 225; Oxtan v. Groves, 68 Me. 371; Kimball v. Kenosha, 4 Wis. 331; Marsh v. Burt, 34 Vt. 289.

So, too, the same general principles apply to streams and water-ways. Upon all rivers not navigable by common law the owner of the land adjoining is *prima facie* owner of the soil to the central line or thread of the stream, subject to the public easement of navigation.¹ The presumption will prevail in all cases in favor of the riparian proprietor, unless controlled by some express words of description which exclude the bed of the river; and in all cases where the river itself is used as a boundary, the law will expound the grant as extending to the center or thread.²

Exceptions and reservations.—A description may be qualified by what are known as *exceptions* or *reservations*. Both a reservation and an exception must be a part, or arise out, of that which is specifically granted in the deed. The difference is that an exception is something taken back or out of the estate then existing and clearly granted, while a reservation is something issuing out of what is granted.³ Thus, an exception is always a part of the thing granted, and of a thing in being.⁴ A reservation is of a thing not in being, but is newly created out of the land and property demised.⁵

The usual operative words to create an exception are, "saving and excepting," etc., but the terms are often used indiscriminately and frequently in conjunction, as "excepting and reserving," etc., and the difference between the two is so obscure in many cases that it has not been observed.⁶ Although there is a technical distinction between the terms, yet where "reserving" is used with evident intent to create an exception, effect should be given in that sense.⁷

¹ Hubbard v. Bell, 54 Ill. 110;
Olson v. Merrill, 42 Wis. 203.

² Braxon v. Bressler, 64 Ill. 488;
Ross v. Faust, 54 Ind. 471; Rice v.
Monroe, 36 Me. 309; State v. Can-
terbury, 28 N. H. 195; Cox v. Fried-
ley, 22 Pa. St. 124.

³ Adams v. Morse, 51 Me. 497;
Kister v. Reeser, 12 Rep. 377.

⁴ Winthrop v. Fairbanks, 41 Me.
307.

⁵ Gay v. Walker, 36 Me. 54.

⁶ Winthrop v. Fairbanks, 41 Me.
307.

⁷ Sloan v. Lawrence Furnace Co.,
29 Ohio St. 568.

A reservation in a deed will never operate to give title to a stranger, though it may, when intended by the parties as an exception, afford notice to the grantee of adverse claims in or to the thing excepted or reserved.¹

A restriction may take effect as a reservation if it does not necessarily deprive the grantee of the essential benefits of the grant.²

The same certainty of description is required in an exception out of a grant as in the grant itself; as, where a deed excepts out of the conveyance one acre of land, and there is nothing in the exception to locate it upon any particular part of the tract, the exception is void for uncertainty, and the grantee takes the entire tract.³ Reservations and exceptions, when expressed in a doubtful manner, are to be construed most strongly against the grantor;⁴ yet if the intention of the parties can be fairly ascertained from the instrument, such intention will govern in its construction.⁵

Land held adversely.—"From an early date," says Washburn, "the policy of the law has not admitted of the conveyance, by any one, of a title to land which is in the adverse seizin and possession of another. This is considered, not as passing a title, but as the transfer of a right of action in violation of the early laws against champerty and maintenance, and therefore not to be sustained by the courts."⁶ This doctrine was long maintained in this country, and still prevails to a limited extent in some of the older states;⁷ but in the west it has been swept away by express statutory enactments, and no conveyance is void because at the time of its execution or delivery the land in question is in the possession of another who holds by a title adverse to that of

¹ West Point Iron Co. v. Reymert, 45 N. Y. 703. Duryea v. New York, 62 N. Y. 592.

² Gay v. Walker, 36 Me. 54.

⁵ Wiley v. Sirdorus, 41 Iowa, 224.

³ Mooney v. Cooledge, 30 Ark. 640.

⁶ 3 Wash. Real Prop. 329 (4th ed.).

⁷ Sohler v. Coffin, 101 Mass. 179;

⁴ Wyman v. Farrar, 35 Me. 64; Jones v. Monroe, 32 Ga. 188.

the grantor.¹ Where such doctrine still prevails, an entry on the land, and delivery there, will evade the letter of the law and make good the deed.² At most, the principle will apply only as to the person holding the adverse title at the time of the execution and delivery of the deed, or those claiming by, through or under him, and as to all others the deed would be valid and effectual.³

(b) *The Estate Conveyed.*

Generally.—The primary object of a deed is to evidence the conveyance or transfer of an estate, and in former times no little ingenuity was displayed by conveyancers in framing grants of estates to meet and keep pace with the refinements and subtleties of courts. The marked differences in the land system of the United States as compared with England and other European nations have at all times been conducive to less complicated methods than were employed elsewhere, but within the last fifty years the abrogation of old laws, customs and usages has made the creation of estates a most simple and, in a majority of cases, easily understood matter. Words of grant, purchase and limita-

¹ Hall v. Ashby, 9 Ohio, 96; Shortall v. Hinkley, 31 Ill. 219; Crane v. Reeder, 21 Mich. 82; Stewart v. McSweeney, 14 Wis. 471. Under these statutes any one claiming title to land, although out of possession, and notwithstanding there may be an actual adverse possession, may sell and convey the same as though in the actual possession, and his deed will give the grantee the same right of recovery in ejectment as if the grantor had been in the actual possession when he conveyed. Chicago v. Vulcan Iron Works, 93 Ill. 222.

² Farwell v. Rogers, 99 Mass. 36; Warner v. Bull, 13 Met. 4.

³ Edwards v. Rays, 18 Vt. 473; Wade v. Lindsey, 6 Met. 407; Betsey v. Torrence, 34 Miss. 138; Farnum v. Peterson, 111 Mass. 151. The English statutes upon which this doctrine was founded grew out of peculiar exigencies entirely foreign to our condition and habits. They were passed at the close of revolutions, when, the property of the kingdom having to a great extent changed hands, it became the interest of those who succeeded to power to place every possible obstacle in the way of the former proprietors recovering possession.

tion were formerly a necessity to measure and define the nature and extent of the estate conveyed; but so comparatively valueless and without effect have they become, that the highest estate known to our law may be created and transferred without them. Covenants that formerly called for highly artificially constructed sentences may now be raised by a single word, and in every other department of conveyancing the departure from old methods is equally noticeable.

Good conveyancing still calls for apt language in the framing of deeds to raise and convey estates; and notwithstanding that the law will supply by implication many of the draughtsman's omissions, yet it will not raise or create estates in opposition to expressed intent, however erroneous such expression may be; nor will it cut down estates which result by implication because of a neglect to insert the proper language to create such lesser estates. Circumstances may induce a modification of this rule where equity is appealed to for relief in cases of fraud, accident or mistake, but at law the rule holds good without exception.

Creation of estates in fee.—An estate in fee-simple, as defined in the old books, is when a man takes by a grant to himself and "his heirs forever," and hence it is an unvarying rule of the common law that an estate of inheritance cannot be created by deed without the employment of the word "heirs;" and in those states where this rule has not been altered by statute or modified by judicial construction, no synonym can supply the omission of this word, nor can the legal construction of the grant be affected by the intention of the parties.¹ This term, when used as above indicated, is called a word of *limitation*, denoting the extent and duration of the grant. Where the word is qualified in some way, as where the grant is to one and the "heirs of his body," this indicates, not an absolute gift to the grantee

¹ *Kearney v. Macomb*, 16 N. J. Eq. See, also, *Jackson v. Meyers*, 3 189; *Adams v. Ross*, 30 N. J. L. 505. *Johns*. (N. Y.) 388.

specifically named, but rather a qualified donation to him and a limitation over to certain persons who are to take as a class, and with respect to whom the term is called a word of *purchase*.

But while words of purchase, inheritance and limitation were once of the very essence of a deed, yet by reason of sweeping statutory provisions, generally enacted throughout the Union, they are now comparatively without value or legal effect. Though invariably inserted by careful conveyancers, such words are no longer necessary to create or convey a fee; and, as a rule, every grant of lands will pass all the estate or interest of the grantor, unless a different interest shall appear by express terms or necessary implication.¹

Corporations, like natural persons, may take land by every method of conveyance known to the law. Having no "heirs" it is customary to insert the term "successors" as a word of limitation, and the employment of such term has been held to create and pass a fee.²

Creation of life estates.—The authorities are not in accord with respect to the creation of life estates, nor in the construction to be placed upon the operative words of purchase or limitation employed in conveyances. The rule in Shelley's Case is frequently resorted to as an aid in construction; yet as this rule does not have a uniform operation in all of the states, and is denied in a number, it does not furnish a safe guide, and being at best but a technical rule is never allowed to control a manifest and clear intent. In most of the states special statutes have been enacted with reference to the creation of estates and the manner of their conveyance; and while these statutes preserve a general resemblance to each other and operate mainly in a uniform manner, yet slight divergencies exist among them all, and for this reason the

¹Hawkins v. Chapman, 36 Md. 83; Kirk v. Burkholz, 3 Tenn. Ch. 425; Lehndorf v. Cope, 122 Ill. 317. ²Storrs Agricultural School v. Whitney, 54 Conn. 342.

reported cases are not always reliable as rules unless the particular statute to which they refer or which controls their inclination is also known and understood.

A conveyance of land directly to a woman and her children, without other words, she then having children, will vest the title in her and her children equally;¹ and it seems no title will vest at law in children thereafter born, although the instrument may declare the grantor's intent that the after-born children shall take.² But such children would take as beneficiaries under a trust by deed,³ or will,⁴ and perhaps the living grantees under such a deed expressly providing for after-born children would hold the legal title in trust for themselves and such children.⁵ A very slight indication of an intention that the children shall not take jointly with the mother will suffice to give the estate to the mother for life, with remainder to the children, as well in the case of a deed⁶ as of a will;⁷ and even though the woman should have no children then living, or if she were unmarried, there would yet be such a contingent remainder in favor of any children she might have, that she would have no power by a conveyance before issue to defeat this contingent remainder in favor of such issue.⁸ If the conveyance be expressly to the mother for life, and after her death to her children, the children born during the life estate

¹Hickman v. Quinn, 6 Yerg. (Tenn.) 96; Loyless v. Blackshear, 43 Ga. 327; Barber v. Harris, 15 Wend. (N. Y.) 615. Such a construction is in strict accordance with the rule of the common law which provides that where a conveyance is made to two or more, with no specification of the estate or interest which each shall have, they shall share equally. See Chess-Carley Co. v. Purtell, 74 Ga. 467.

²Lillard v. Ruckers, 9 Yerg. (Tenn.) 64; Newsom v. Thompson,

2 Ired. (N. C.) 277. But see Barber v. Harris, 15 Wend. (N. Y.) 615.

³Gray v. Hayes, 7 Humph. (Tenn.) 588.

⁴Turner v. Ivie, 5 Heisk. (Tenn.) 222.

⁵Holmes v. Jarret Moon, 7 Heisk. (Tenn.) 506; Jackson v. Sisson, 2 Johns. Cas. 321; Schumpert v. Dilard, 55 Miss. 438.

⁶Moore v. Simmons, 2 Head, 506.
⁷Bunch v. Hardy, 3 Lea (Tenn.), 543.

⁸Frazer v. Sup. of Peoria, 74 Ill. 282.

would take, the remainder vesting as they came into being, and opening to let in those born afterward.¹

The rule in Shelley's Case.—Closely connected with the subjects we have just been considering is the topic that forms the heading to this paragraph. Among the early legal abstractions which grew out of the efforts of jurists to carry into effect the general intent of a grantor or testator by annexing particular ideas of property to particular modes of expression was the adoption of the principle that, where a conveyance is made to a person for life, remainder to his heirs or the heirs of his body, instead of giving him a life estate and a contingent remainder to the heirs, it vests a fee-simple or an estate-tail, as the case may be, in the first grantee. This construction is said to have been adopted for the purpose of saving to the lord the profits or perquisites incident to inheritance, and also upon the general ground of preventing an abeyance of the fee, which would render it inalienable during the life of the first taker. The principle was recognized from a very early period, but only became finally established in a proceeding called "*Shelley's Case*;" and from the notoriety which the case has received from its subsequent citation in connection with the application of the rule therein laid down, it has acquired a world-wide renown as "*the rule in Shelley's Case*."

This remarkable rule has been productive of an almost incredible amount of controversial disquisition, and an apparently innumerable number of decisions both in England and the United States; and, notwithstanding the fact that in this country there can be no entailed estates, strictly speaking, the rule still has a modified force, and is often resorted to as a rule of construction, particularly in cases where the questions involved turn upon the point as to whether the conveyance which forms the foundation of title passed only a life estate or a fee.

¹ *Beecher v. Hicks*, 12 Reporter, 123; *Blair v. Vanblarcum*, 71 Ill. 290.

Continued — The rule as defined by Kent.— Chancellor Kent defines the rule as follows: "When a person takes an estate of freehold, legally or equitably, under a deed, will or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs or heirs of his body, as a class of persons, to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate."¹

Continued — The rule as defined by Preston.— Mr. Preston, in his essay on the rule in Shelley's Case, among several definitions, gives the following: "In any instrument, if the freehold be limited to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate; if it be limited to the heirs of his body, he takes a fee-tail; if to his heirs, a fee-simple."²

The definition by Kent is that which is generally received as an authoritative exposition of the doctrine; and as estates-tail have been generally abolished in this country, the rule thus stated applies generally to all cases where there is a grant of a particular estate to the grantee with remainder over to a class of persons designated. In such cases, under the rule, the words "heirs" or "heirs of the body" are regarded as words of limitation and not of purchase.³

In some states, however, while estates-tail as they existed under the old law have been abolished, yet the statute has saved the entail to the first degree, thus giving a life estate to the first taker, and vesting in the second taker a remainder in fee. In those states, therefore, the rule as defined by Preston is adopted, and when the remainder is to the "heirs of the body," the estate thus conferred is in the nature of, if not, an estate-tail, to which the rule in Shelley's

¹ 4 Kent, Com. 225.

422; Forrest v. Jackson, 56 N. H.

² And see 2 Black. Com. 115.

357; Smith v. Block, 29 Ohio St.

³ See Bradford v. Howell, 42 Ala. 488; King v. Rea, 56 Ind. 1.

Case, as declared by Kent, does not apply. The words of heirship and procuration, in such event, will be regarded as words of purchase and not of limitation, and the first taker will take only a life estate, and the heirs of his body will take the remainder in fee.¹

With respect to the effect of this rule the authorities differ. In some instances it has been held that the rule is not one of construction, but an inexorable rule of law, that when the ancestor takes a preceding freehold, a remainder shall not be limited to his heirs as purchasers.² On the other hand, it is held that the rule, at most, is only a technical rule of construction, and must give way to the clear intention of the donor, when that intention can be ascertained from the instrument in which the words supposed to be words of limitation are used.³ This is the view now generally taken.

Future estates.—Broadly stated, no estate in real property can be bargained, sold or released before it is acquired by the grantor. A mere expectation or belief that a party will at some future time acquire an interest in certain property is not in itself an estate or assignable interest of any kind, and cannot be conveyed by deed.⁴ Hence, the conveyance by an heir apparent of his expectancy in land owned by his living ancestor, which would descend to him if he survived his ancestor, and the latter should die intestate owning the same, being a conveyance of a mere naked possibility not coupled with an interest, would pass no estate or interest in the land. Such a title would not operate to defeat the grantor's own title afterward acquired by descent, except by way of estoppel; and if the conveyance contained no covenant of warranty, such grantor would not be precluded from

¹ Butler v. Huestis, 68 Ill. 594.

³ Belslay v. Engel, 107 Ill. 182.

² See Ridgeway v. Lamphear, 99 Ind. 251; Ware v. Richardson, 3 Md. 505; Cooper v. Cooper, 6 R. I. 261.

⁴ Lamb v. Kamm, 1 Sawyer (U. S. C. Ct.), 238.

asserting an after-acquired title.¹ But where a conveyance of this character is made with covenants of warranty, it will operate to pass the title by estoppel if the land descends to the heir.²

So, too, where lands are conveyed by deed of bargain and sale simply, which ordinarily operates only to transfer vested estates and interests, if it distinctly appears on the face of the deed that it was intended to transfer any future interest which the grantor might acquire, equity will treat the deed as an executory agreement to convey, and compel the grantor to convey the subsequently-acquired interest.³

Where the grantor actually possesses a full estate in land, he may, as a rule, carve out of it any estate to commence in the future. At common law an attempt to create or convey a freehold or estate of inheritance *in futuro* was a nullity, the nearest approach being a covenant to stand seized to uses, and this was only permissible when the consideration was blood or marriage;⁴ nor was it until very recently that such conveyances have been recognized in the United States, unless such estate had first been filtered through the medium of a trustee. As it is, such conveyances are rare, and possibly in some states of doubtful efficacy. Usually they will be found to take the form of a common deed of bargain and sale, with a proviso restraining the grantee from using or occupying the granted premises during the life or lives of the grantor,⁵ or defining the time at which the deed shall become effective, though in this respect they are variant,

¹ Hart v. Gregg, 32 Ohio St. 503; Boynton v. Hubbard, 7 Mass. 112. In this case a covenant was made by an heir to convey, on the death of his ancestor, if he should survive him, a certain undivided part of what should come to him by descent, and same was held to be void at law as well as in equity.

² Rosenthal v. Mayhugh, 33 Ohio St. 158; Bohon v. Bohon, 78 Ky. 408.

³ Hannon v. Christopher, 34 N. J. Eq. 459.

⁴ 2 Black. Com. 338; Jackson v. McKenny, 3 Wend. 233; Brewster v. Hardy, 22 Pick. (Mass.) 380; Spaulding v. Gregg, 4 Ga. 81.

⁵ See Chandler v. Chandler, 55 Cal. 267; Abbott v. Holway, Adm'r, 72 Me. 298; Shackleton v. Seebree, 86 Ill. 616; Kent v. Atlantic De Laine Co., 8 R. I. 305; Bohon v. Bohon, 78 Ky. 408.

occasionally partaking of the nature of a contingent remainder. If otherwise sufficient, a conveyance of land in fee to take effect at a future time is valid, and will vest the fee in the grantee according to the terms of the conveyance.¹

Under the statutes now in force in a majority of the states the owner of real estate may convey, in the manner prescribed, any part or portion of his estate, as he and his grantee may agree, subject only to those restrictions which the law imposes as required by public policy, but relieved from the technical doctrines which arose out of ancient feudal tenures, and all the restrictive effect which they had upon alienations.

5. *The Covenants.*

Generally considered.— Among the clauses usually inserted in deeds there are a number of stipulations in the nature of collateral promises of the performance or non-performance of certain acts, or of agreements that a given state of things does or shall, or does not or shall not, exist, which are technically known as *covenants*. When relating to title, they are inserted for the purpose of securing to the grantee the benefit of the title which the grantor professes to convey, and as an indemnity against any loss that may arise in consequence of any impairment or defect of such title. By statute the employment of certain operative words of grant are also given the force of limited covenants for certain purposes.

Covenants are said to be *implied*, as where they are raised by intendment of law from the use of certain words, and *express*, as where the promise or agreement is set forth in explicit language declaring the intention of the parties. Implied covenants must be consistent with, and not contrary to, the express covenants;² and where a deed contains both, the latter qualifies and restrains the former.³ Covenants are

¹ Furgusen v. Mason, 60 Wis. 377. 258; Sumner v. Williams, 8 Mass.

² Gates v. Caldwell, 7 Mass. 68. 201.

³ Kent v. Welch, 7 Johns. (N. Y.)

also classified as *personal*, or those raised for the express benefit of the immediate grantee, and *real*, or those which run with the land and may be enforced by a remote grantee, though some confusion exists as to the division between them.

The whole doctrine of covenants grew out of the ancient system of warranty, which originally was an implication of the feudal law binding the lord to recompense his tenant, when evicted from his feud, with another of equal value. The term "warranty," however, as it is used in connection with covenants of title in this country, has but little affinity with the ancient remedy; and, while the name has been retained, the present prevailing doctrine seems to be essentially American both in principle and practice. Indeed, it does not seem that the general covenant of warranty employed in this country ever had a place in English conveyancing.¹

The general use of covenants for title seems to have come into vogue somewhere towards the close of the seventeenth century, superseding the ancient feudal warranty; yet, just how they came to be introduced, or how they originated, are matters which legal historians are unable to determine, and the accounts which have come down to us amount to little or nothing more than mere conjectures.² The early covenants were expressed in short and simple forms; and it was not until about the time of the restoration of Charles II. that they commenced to assume the form by which they have since been known.

The covenants of a deed add nothing to its efficiency as a means of conveyance.

Creation of covenants.—It is fundamental that no particular form of expression or arrangement of words is necessary to create or raise covenants,³ and that any language

¹ See Rawle, Covts., § 13; Jones v. Franklyn, 30 Ark. 681. authoritative exposition of this subject.

² The student is referred to Mr. Rawle's excellent treatise on Covenants for Title for a full and
³ Jackson v. Swart, 20 Johns. (N. Y.) 85; Bull v. Follett, 5 Cow. (N. Y.) 170.

showing intention and manifesting a promise is sufficient for the purpose.¹ The artificial rules of conveyancing have prescribed forms, and the law has given specific and well-defined meanings to certain words employed therein; but the liberal construction always accorded to stipulations of this character permits the obvious intention of the parties to have effect regardless of form or phraseology.²

Implied covenants, or, as they are sometimes called, covenants in law, are raised in some instances by the employment of certain words having a known legal operation in the creation of an estate. These words, besides their efficacy in granting the estate, are by law given a secondary force, as it were, constituting an agreement on the part of the grantor to protect and preserve the estate so by those words already created. In their origin they are distinctly traceable to the feudal constitutions, and grew out of the reciprocal relations of the feudal lord and his tenant. The covenant or promise was raised from the words of grant, the fact of feoffment carrying with it the correlative duty of protection, and this principle has been retained and forms the basis upon which the implied covenants rest wherever they are permitted to obtain.

The modern tendency has been to limit and restrict the operation of covenants implied from the use of words of grant. In many states they have been expressly abrogated by statute, and in other states derive their main efficacy from statutory authorization. In the states which still recognize implied covenants, the employment in a deed of the words "grant, bargain and sell," as the equivalent of the ancient expression "*dedi, concessi, demisi*," etc., will raise common-law covenants unless limited by express words contained in such deed.³

But while these words are permitted to exert a certain

¹ Taylor v. Preston, 79 Pa. St. 436; Mich. 140; Wadlington v. Hill, 18 Hallett v. Wylie, 3 Johns. (N. Y.) Miss. 560.

44.

³ This matter is now wholly statutory and varies with locality.

² Johnson v. Hollensworth, 48

efficacy in the absence of other and more direct expressions, yet their employment will not create covenants against the manifest intention of the parties. The covenants raised by law from the use of particular words in the deed are only intended to be operative when the parties themselves have omitted to insert covenants, and the use of any language from which it appears that the parties intended that these words should not have such an effect will destroy the force of the implied covenant.¹

Continued—Statutory deeds.—An attempt has been made in many states to simplify the forms of conveyancing by statutory enactments prescribing a model or precedent for the ordinary deeds in common use and declaring its effect. These forms are entirely without *habendum*, and the force and effect of the covenants, when the deed is intended to carry covenants, has been transferred to and merged in the operative words of grant. These words are usually “convey and warrant,” and in legal effect the deed is held to contain the five covenants in common use in common-law forms. All the covenants mentioned in the statute are to be regarded and treated as though they were incorporated in the deed, of which they constitute a part equally as though written therein.²

Construction of covenants.—As a general rule, covenants are to be construed according to their spirit and intent;³ they should be considered in connection with the context, and must be performed according to the intention of the parties as ascertained from both.⁴ General covenants may be restricted by special covenants;⁵ but usually all of the

Usually the covenants of an inde-
feasible estate, freedom from in-
cumbrances and quiet enjoyment,
are raised by the statutory words
of grant.

¹ *Finley v. Steele*, 23 Ill. 56; *Stewart v. Anderson*, 10 Ala. 504; *Winston v. Vaughn*, 22 Ark. 72.

² *Carver v. Louthain*, 38 Ind. 530.

³ *Ludlow v. McCrea*, 1 Wend. (N. Y.) 328; *Schoenberger v. Hoy*, 40 Pa. St. 132.

⁴ *Marvin v. Stone*, 2 Cow. (N. Y.) 781; *Wadlington v. Hill*, 18 Miss. 560.

⁵ *Whallon v. Kauffman*, 19 Johns. (N. Y.) 97.

covenants are to be construed, as nearly as possible, according to the obvious intention of the parties, which must be gathered from the whole instrument interpreted according to the reasonable sense of words.¹ In case of doubt they should be construed most strongly against the covenantor and in favor of the covenantee;² but this is permitted only as a last resort, and when the clause is equally open to two or more inconsistent interpretations.

Common covenants.—While covenants may be entered into for any matter connected with the estate conveyed and will be governed by the general principles heretofore shown, yet there are a number of ordinary and usual covenants which accompany nearly every conveyance which purports to be with covenant; these we may, with propriety, call the common covenants.

The first, in the order in which they usually appear, is called the covenant of *seizin*. This, in effect, is a statement that the grantor is well seized of the premises conveyed as of a sure, perfect and indefeasible estate of inheritance in fee-simple, or of such other estate as may form the subject of the grant; and, notwithstanding that in a few states this is regarded as a covenant for possession only, the general American doctrine makes it a covenant for title, which is broken as soon as made if the grantor at the time of conveyance has no title.³

The second covenant is a like statement that the grantor has a *good right to convey* the premises granted. Like the preceding, it is a covenant for title, and broken, if at all, immediately upon the execution of the deed.⁴

The third covenant is that the lands are free from all *in-*

¹ Wadlington v. Hill, 18 Miss. 560; Schoenberger v. Hoy, 40 Pa. St. 132; Marvin v. Stone, 2 Cow. (N. Y.) 781. King v. Gilson, 32 Ill. 348; Stewart v. Drake, 9 N. J. L. 139; Camp v. Douglass, 10 Iowa, 586; Mitchell v. Hazen, 4 Conn. 497.

² Randel v. Canal Co., 1 Harr. (Del.) 154.

⁴ Bickford v. Page, 2 Mass. 455; Richardson v. Dorr, 5 Vt. 20; Scant-

³ Pote v. Mitchell, 23 Ark. 590; lin v. Allison, 12 Kan. 85.

cumbrances. This covenant embraces every right to and interest in the lands conveyed, diminishing the value of the estate, but not inconsistent with the transfer of the fee. It is not a mere covenant to indemnify, though often described as such, but an engagement that the grantor's title is not incumbered, and is broken, if at all, at the instant of its creation.¹

The fourth covenant is that for *quiet enjoyment* of the lands conveyed. It is prospective in its operation, and goes only to the possession, not to the title. It is broken only by an eviction from or some actual disturbance in the possession of the property.² In this respect it differs from the covenant of seizin, although, as a general rule, the measure of damages for a breach thereof is the same.

The fifth is the covenant of *general warranty*, the most comprehensive, as well as important, of all the ordinary covenants contained in a deed. It is a covenant for title, is prospective in character, and is broken only by an eviction, or something equivalent thereto, or a disturbance of the peaceful enjoyment of the grantee.³ The true meaning of the covenant of general warranty is that the grantee, his heirs and assigns, shall not be deprived of possession by force of a superior title, and in effect it is the same as that of quiet enjoyment, extending both to the possession and the title. Hence, any disturbance of the free and uninterrupted use of the land, though without actual expulsion therefrom, is in law an eviction and a breach of the covenant.⁴

In addition to the familiar covenants above alluded to there are others that occasionally find expression. The chief of these less known covenants is that for *further assur-*

¹ Chapman v. Kimball, 7 Neb. 399; Eaton v. Lyman, 30 Wis. 41; Andrews v. Davison, 17 N. H. 413. ³ Scott v. Kirkendall, 88 Ill. 495; Park v. Bates, 12 Vt. 381; Post v. Campau, 42 Mich. 90.

² Hayes v. Ferguson, 15 Lea (Tenn.), 1; McGary v. Hastings, 39 Cal. 360; Boothby v. Hathaway, 20 Me. 251. ⁴ Rindskopf v. Loan Co., 58 Barb. (N. Y.) 36; King v. Kerr, 5 Ohio, 154; Burrage v. Smith, 16 Pick. (Mass.) 56.

ance, which relates both to the title of the grantor and to the instrument of conveyance, and operates as well to secure the performance of all acts necessary for supplying any defect in the former as to remove all objections to the sufficiency and security of the latter. It is less extensively used in the United States than any of the other covenants for title. The covenant is practically an undertaking on the part of the grantor to do such further acts for the purpose of perfecting the purchaser's title as the latter may reasonably require.¹

Covenants running with the land.—A covenant runs with the land when either the liability for its performance or the right to enforce it passes to the assignee of the land itself;² but in order that a covenant may run with the land, its performance or non-performance must affect the nature, quality or value of the property demised independently of collateral circumstances,³ or it must affect the mode of enjoyment, and in all cases there must be a privity between the contracting parties.⁴

As a rule, all covenants which relate to and are for its benefit run with the land and may be enforced by each successive assignee into whose hands it may come by conveyance or assignment.⁵ Where, however, the covenant relates to matters collateral to the land, its obligation will be confined strictly to the original parties to the agreement.⁶ So, too, there is a wide difference between the transfer of the burden of a covenant running with the land and of the benefit of the covenant; or, in other words, of the liability to

¹ See *Armstrong v. Darby*, 26 Mo. 83; *Norcross v. James*, 140 Mass. 517; *Miller v. Parsons*, 9 Johns. 188. (N. Y.) 336.

² *Dorsey v. Railroad Co.*, 58 Ill. 65; *Brown v. Staples*, 28 Me. 497; *Clarke v. Swift*, 3 Met. (Mass.) 390.

³ *Norman v. Wells*, 17 Wend. (N. Y.) 136.

⁴ *Wiggins v. Railway Co.*, 94 Ill.

⁵ *Sterling Hydraulic Co. v. Williams*, 66 Ill. 393; *Bronson v. Coffin*, 108 Mass. 175.

⁶ *Gibson v. Holden*, 115 Ill. 199; *Parish v. Whitney*, 3 Gray (Mass.), 516.

fulfill the covenant and of the right to exact its fulfillment. The benefit will pass with the land to which it is incident, but the burden or liability will be confined to the original covenantor, unless the relation of privity of estate or tenure exists or is created between the covenantor or covenantee at the time when the covenant was made.¹ This naturally follows from the principle that the obligation of all contracts is ordinarily limited to those by whom they were made, and if privity of contract be dispensed with, its absence must be supplied by privity of estate.

Where a covenant is not of such a nature that the law will permit it to be attached to an estate as a covenant running with the land, it cannot be made such by an agreement of the parties.²

It is a further rule that covenants will run with incorporeal as well as corporeal hereditaments.³

The covenant of warranty is always held to be prospective, and to be unbroken until eviction. This covenant, therefore, always runs with the land for the benefit of any and all successive grantees.⁴ The same is true of the covenant for quiet enjoyment; and while covenants for seizin and against incumbrances are generally held to be *in presenti*, and hence become mere rights of action enforceable only by the original covenantee,⁵ yet in some states it has been held that they too run with the land so far as to permit an action to the particular successive grantee on whom the damages occasioned by their breach actually falls.⁶

In estates not of inheritance, or less than the fee, all

¹ See *Cole v. Hughes*, 54 N. Y. 444; *Weld v. Nichols*, 17 Pick. (Mass.) 543.

² *Gibson v. Holden*, 115 Ill. 199.

³ *Fitch v. Johnson*, 104 Ill. 111; *Van Rensselaer v. Read*, 26 N. Y. 558; *Hazlett v. Sinclair*, 76 Ind. 448; but see *Mitchell v. Warner*, 5 Conn. 497; *Wheelock v. Thayer*, 16 Pick. (Mass.) 68.

⁴ *Chase v. Weston*, 12 N. H. 413; *Flaniken v. Neal*, 67 Tex. 629; *Montgomery v. Reed*, 69 Me. 510.

⁵ *Blondeau v. Sheridan*, 81 Mo. 545; *Davenport v. Davenport*, 52 Mich. 587; *Real v. Hollister*, 20 Neb. 112.

⁶ See *Allen v. Kennedy*, 91 Mo. 324; *Cole v. Kimball*, 52 Vt. 639.

covenants which come within the general rules first mentioned are deemed to run with the land. Thus, a covenant to repair is regarded as a continuing covenant.¹

6. *The Conditions.*

Generally considered.—Probably the most familiar and widely employed method of imposing burdens on a grantee, or of subjecting the estate conveyed to some particular restriction or limitation, or of confining the enjoyment of the granted premises to some specific form of use, is by the insertion in the deed of a recital technically known as a *condition*, the effect of which, in case of breach, may be to modify or defeat the grant with which it is connected.

The general nature, legal effect and classification of conditions has been shown in a former part of this work,² and need not here be repeated.

As a rule, any condition which is repugnant to the estate granted will be invalid, but it has been held that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. Repugnant conditions are those which tend to the utter subversion of the estate; such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons, or for a limited period, or its subjection to particular uses, are not subversive of the estate. They do not destroy or limit its alienable or inheritable character, and the reports are full of cases where conditions imposing restrictions upon uses to which property conveyed in fee may be subjected have been upheld. In this way slaughter-houses, soap factories, saloons, distilleries, livery-stables, tanneries and machine-shops have, in a multitude of instances, been excluded from particular localities, which, thus freed from unpleasant sights, noxious vapors or disturbing noises, have

¹ Demarest v. Willard, 8 Cow. ² See p. 47, *supra*.
(N. Y.) 206.

become desirable as places for residences of families.¹ That such a purpose is a legitimate one, and may be carried out consistently with the rules of law, by reasonable and proper covenants, conditions or restrictions, cannot be doubted.

Conditions restricting the use of the premises conveyed are usually conditions subsequent, and often provide for a reversion of the title upon their breach, and upon which the grantor may recover in ejectment.² Inasmuch as estates upon condition working forfeiture are odious,³ the courts have generally laid hold of any plausible feature to sustain them. Such conditions are not favored, and must be construed strictly,⁴ and will under no circumstances be enforced further than may be absolutely required; and so strong is the principle engrafted in the law, that courts of equity will seldom lend their aid to divest an estate for breach of a condition.⁵

Creation of conditions.—By long and almost immemorial usage, and the repeated adjudications of courts, a condition may be raised by the employment of the term itself, the usual formula being: "Provided always, and this deed is upon the express condition."⁶ These terms, "provided always," "upon the express condition," etc., have frequently been held to create an estate upon condition,⁷ unless the context, or something in other parts of the deed, tends to negative this idea. So, also, the words, "if," "if it shall so

¹ *Cowell v. Colorado Springs Co.*, 389; *Hoyt v. Kimball*, 49 N. H. 327; 100 U. S. 55; *Plumb v. Tubbs*, 41 N. Y. 442; *Collins v. Marcy*, 25 Conn. 242; *Sperry v. Pound*, 5 Ohio, 189; *Gray v. Blanchard*, 8 Pick. (Mass.) 284; *Clark v. Martin*, 94 Pa. St. 289.

² *Plumb v. Tubbs*, 41 N. Y. 442.

³ *Warner v. Bennett*, 31 Conn. 478; *Palmer v. Ford*, 70 Ill. 369; *Craig v. Wells*, 11 N. Y. 315.

⁴ *Gadberry v. Sheppard*, 27 Miss. 203; *Bradstreet v. Clark*, 21 Pick.

389; *Hoyt v. Kimball*, 49 N. H. 327; 4 Kent, Com. 130; *Woodworth v. Paine*, 74 N. Y. 196.

⁵ *Warner v. Bennett*, 31 Conn. 478; *Insurance Co. v. Walsh*, 54 Ill. 164; *Palmer v. Ford*, 70 Ill. 369; *Wing v. Railey*, 14 Mich. 83; *Smith v. Jewett*, 40 N. H. 530.

⁶ See 4 Kent, Com. 122; 2 Wash. Real Prop. 3.

⁷ Sometimes called a base or qualified fee.

happen," or other equivalent expressions, when relating to matters depending on contingencies, have been taken and held to operate in the same manner. These expressions are given as examples by the elementary writers,¹ and are also in common use.²

The language employed, however, except as it may tend to disclose intention, is comparatively of little moment; for the intention of the parties, when apparent, will always control technical terms,³ and when it is clear that technical words have been used to express ideas different from their technical signification, courts are ever inclined to construe them according to such intent.⁴

The use of technical words which in themselves import conditions will ordinarily be held to create the same, for technical words are presumed to be used in their legal sense unless there is a plain intent to the contrary;⁵ while the addition of a clause of re-entry or forfeiture unmistakably discloses the nature of the recital.⁶

The tendency of modern times is to relax the stricter rules which raise and govern conditions, and to construe recitals which limit or restrict the use of property as covenants rather than conditions. Covenants, like conditions, do not depend upon precise or technical words;⁷ and whatever shows the intent of the parties to bind themselves to the performance of a stipulation may be deemed a covenant without regard to the form of expression.⁸ A covenant or condition may be created by the same words.⁹ Hence, while

¹ See 4 Kent, Com. 122; 2 Wash. Real Prop. 3.

² Hammond v. Railway Co., 15 S. C. 10; Sohler v. Church, 109 Mass. 1; Hooper v. Cummings, 45 Me. 359.

³ Collins v. Lavalley, 44 Vt. 230; Krantz v. McKnight, 51 Pa. St. 232; Saunders v. Hanes, 44 N. Y. 253.

⁴ Railroad Co. v. Beal, 47 Cal. 151; Churchill v. Reamer, 8 Bush (Ky.), 256.

⁵ Butler v. Huestis, 68 Ill. 594; Francis Estate, 75 Pa. St. 220.

⁶ Emerson v. Simpson, 43 N. H. 475.

⁷ See Newcomb v. Presbrey, 8 Met. (Mass.) 406; Davis v. Leyman, 6 Conn. 252.

⁸ Taylor v. Preston, 79 Pa. St. 436; Hallet v. Wylie, 3 Johns. (N. Y.) 44.

⁹ Chapin v. Harris, 8 Allen (Mass.), 594.

if a condition is plainly manifest it must prevail, yet, if it be doubtful whether a clause imports a covenant or a condition, or if the language employed is not in form either a covenant or condition, the effect accorded will be that of a covenant and not a condition.¹

Operation and effect.—A covenant, condition or stipulation inserted in a deed delivered to and accepted by the grantee will bind him to a due observance of the covenant or performance of the condition whenever same directly relates to the land embraced in the conveyance,² or is connected with such lands and those immediately adjoining.³

The grantor may impose a restriction, in the nature of a servitude, upon the land which he sells for the benefit of the land, which he retains; and, if that servitude is imposed on the heirs and assigns of the grantee and in favor of the heirs and assigns of the grantor, it will be binding upon and may be enforced against any subsequent purchaser of the property with notice.⁴

So, also, the grantor may impose a servitude or condition upon the land which he retains and in favor of the land he sells, but the principle is the same; and when an owner subjects his lands to any servitude and transmits them to others charged with the same, any one taking title to such lands, with notice of the conditions or restrictions affecting their use or the method of their enjoyment, takes subject to the burdens thus imposed, and, as standing in the place of his grantor, is bound to do or forbear from doing whatever his grantor should do or should not do.⁵

¹ See *Gallagher v. Herbert*, 117 Ill. 160; *Hoyt v. Kimball*, 49 N. H. 322; *Thornton v. Trammell*, 39 Ga. 202.

² *Kimpton v. Walker*, 9 Vt. 191; *Clark v. Martin*, 49 Pa. St. 289; *Stines v. Dorman*, 25 Ohio St. 580.

³ *Burbank v. Pillsbury*, 48 N. H. 475; *Bronson v. Coffin*, 108 Mass. 175; *Hazlett v. Sinclair*, 76 Ind. 488.

⁴ *Whitney v. Railroad Co.*, 11 Gray (Mass.), 359; *Clark v. Martin*, 49 Pa. St. 289.

⁵ *Trustees v. Lynch*, 70 N. Y. 440.

Conditions in restraint of alienation.—By the iron rule of the feudal law the grantee of a feud possessed no power of alienation, and upon his death the land reverted to his superior lord. This rigorous rule in time became modified so as to permit an inheritance by the grantee's heirs, but with the right of reversion on the extinction of his blood; and as there always remained in the grantor a possibility of a reverter, this was considered such an interest in the land as entitled him to restrict the power of alienation. And so the law remained until the enactment of what is known as the statute *quia emptores*.¹ This cut off the possibility of reverter by giving to every freeman the right to sell his lands at his own pleasure, so that his feoffee should hold them of the chief lord by the same service and customs as the feoffor held them before. The possibility of reverter having thus been destroyed, the grantor's interest in the land ceased and he was no longer able to prohibit the right of alienation.

Since the enactment of the statute *quia emptores*, therefore, no conditions or restrictions in a conveyance of the fee which prohibit the alienation of land have been allowed to have any effect, and, being repugnant to the estate granted, are considered void upon that ground alone.² This principle is well established in the jurisprudence of every American state, and has on several occasions been re-affirmed by the supreme court of the United States.

It has frequently been held, particularly where the deed is one of gift, that a partial restraint—that is, a restraint against alienation for a limited time, or to certain persons—may be permitted,³ though upon this point the authorities

¹ Enacted in 1290, 18 Edw. I., ch. 1.

² For a very elaborate and exhaustive discussion of this question, see *Mandlebaum v. McDonnell*, 29 Mich. 78. The same subject is very fully considered in *De Peyster v. Michael*, 6 N. Y. 467. See, also, *McCullough v. Gilmore*, 11

Pa. St. 370; *Bank v. Davis*, 21 Pick. (Mass.) 42; *McCleary v. Ellis*, 54 Ia. 311.

³ *Crowell v. Springs Co.*, 100 U. S. 55; *Hunt v. Wright*, 47 N. H. 396; *Langdon v. Ingram's Guardian*, 28 Ind. 340.

are not agreed, some cases strenuously insisting that the power of disposal cannot be arrested for a single day.¹

7. *Signing.*

Generally considered.—While all of the different acts of execution are to a greater or less extent necessary to the validity of a deed, yet it derives its main efficacy from the signature; for an unsigned instrument, though duly attested, acknowledged and delivered, is a nullity.²

By the old rules of the common law a signature was not considered necessary to the validity of a deed, the seal being sufficient to show assent and prove execution. This was doubtless occasioned by reason of the very general inability of the mass of the people to read and write,³ and the importance which was formerly attached to seals as the signets of their owner. It would seem, however, that under the Saxon rule signing was in general use provided the parties were able to write, and whether they could write or not it was customary to affix the sign of the cross; but on the Norman conquest waxen seals, usually with some specific device, were introduced and took the place of the Saxon method of writing the name and making the sign of the cross.

By the statute of 29 Charles II., for the prevention of frauds and perjuries, all transfers of land were required to be put in writing and signed by the parties making same, and this statute is the foundation of the American laws upon the same topic.⁴

Method of signing.—While the law is strenuous in its demand that the deed of a grantor must be attested by his

¹ Mandlebaum v. McDonnell, 29 Mich. 78; Oxley v. Lane, 35 N. Y. 347; Anderson v. Cary, 36 Ohio St. 506.

² Goodman v. Randall, 44 Conn. 325; Jones v. Gurlie, 61 Miss. 423.

³ See 1 Reeves' Hist. Eng. Law, 184.

⁴ In Blackstone's time, signing does not appear to have been essential to validity, although he says (1 Com. 305), "It is said to be requisite that the party whose deed it is should seal, and now in most cases, I apprehend, should sign it also."

signature, it is equally lenient as to the method by which such signature shall be appended. Thus, the deed may be signed by the grantor himself or by some other person acting for him. In the latter event, the person assuming to act must, of course, have a proper authorization so to do; and this authority, usually called a power of attorney, must be of a character equal in dignity to the instrument to which the principal's name is appended. In case of a deed, being an instrument under seal, the authorization must itself be under seal.¹

To the rule last stated an important exception has been made in many states, by which, if the name of the grantor is affixed by some other person, at his request and in his presence, such signing is made as effectual for all intents and purposes as though it had been the grantor's personal act.² A still further exception has been made in some states, where a signature, though subscribed by another hand and in the absence of the grantor, is nevertheless subsequently recognized by him and adopted as his own.³

As the true meaning of a signature is to evidence the disposing purpose of the grantor, it follows that any act of his plainly evincing intention will be binding upon him; and while his name, appended by his own hand, is the highest and best evidence of such intention, yet any other unequivocal act done or directed by him may be equally effective. Hence it is that a person physically unable, or too illiterate, to write his name may sign by any arbitrary symbol — a cross, a crooked line, or any other device intended by him as a sign-manual; and the adoption of such mark or device, if the deed is in other respects regular, will be as effective to transfer the estate as if his name had been written thereon in full by himself.⁴

¹Fire Ins. Co. v. Doll, 35 Md. 89; 65; Jansen v. Cahill, 22 Cal. 563; Watson v. Sherman, 84 Ill. 263; Conlan v. Grace, 36 Minn. 276. Videau v. Griffin, 21 Cal. 389. ³Greenfield Bank v. Crafts, 4

²Gardner v. Gardner, 5 Cush. Allen (Mass.), 447. (Mass.) 483; Frost v. Deering, 21 ⁴Truman v. Love, 14 Ohio St. Me. 156; Goodell v. Bates, 14 R. I. 144; Life Ins. Co. v. Brown, 30 N.

In the event just considered a grantor's mark may be made by himself or by merely touching the pen in the hands of another.¹ It is customary and proper to write the words "his mark" over or near the device adopted by the marksman, yet this is not essential; it is sufficient in every case if it appears that he in fact made the mark or adopted it.²

8. *Sealing.*

Generally considered.—It has long been the policy of the law to give ceremony and solemnity to the execution of important documents, and it has been held that it is in furtherance of this policy that seals are required to deeds and other instruments relating to the conveyance of land.³ It would seem, however, that this method of authentication had its origin in the ignorance of the people and is the outgrowth of the conditions of the times. The general practice of sealing was introduced and brought into use in England by the Normans, after the conquest, and thenceforward no written agreement was considered as a deed unless attested in this manner.⁴

This ancient usage has been retained in modern conveying, but with no very definite ideas as to its character or import; the world has outgrown the necessities of an age when men affixed their seals because they could not write, and what then, from necessity, attested the genuineness of the act of execution has now become a mere arbitrary form, preserved mainly as a technical requirement in support of the long-established distinction between writings "under seal" and those which are not. A seal does not in any way affect the substance of the instrument, or add to, or detract from, the obligation which it purports, and in a number of states its use has been discontinued. But in those states

J. Eq. 193; *Sellers v. Sellers*, 98 (N. Y.) 245, for an instructive discussion on this subject by Kent, N. C. 13. C. J.

¹ *Harris v. Harris*, 59 Cal. 620.

² *Sellers v. Sellers*, 98 N. C. 13.

³ See *Warren v. Lynch*, 5 Johns.

⁴ Cruise, Dig., tit. 32, ch. II.

where the distinction between sealed and unsealed instruments has been preserved, while the law has become relaxed in favor of custom and convenience in doing business, yet this relaxation is confined to the manner of making the seal only. In such jurisdictions sealing is still the criterion of a specialty, and the particular act which imparts special character to a conveyance and makes it in fact a deed.¹

Method of sealing.—A seal, as defined by all the earlier commentators, is an impression upon wax, wafer or some other tenacious substance capable of being impressed.² The convenience of wax was its first and only recommendation; but as it is the impression and not the wax which constitutes the seal, any other adhesive substance capable of receiving an impression will answer equally well. As a matter of fact, at the present time neither wax nor wafer is in general use, as paper has been found to possess all the essential qualities of both of these articles, and to be fully as capable of being impressed by the devices now in common use.³

But while any impression is good as a common-law seal, the general disuse of private seals has led to the substitution of other methods to indicate the fact of sealing; and courts, conforming to the changed conditions of the people, have relaxed the ancient rules in this respect. A piece of colored paper apparently affixed as a seal, but without impression or device of any kind, has been held a sufficient sealing,⁴ while in a majority of the states where seals are still required, a scrawl has, by statute, the force of a seal, whenever it appears from the body of the instrument, the scrawl itself, or the place where affixed, that such scrawl

¹ Alexander v. Polk, 39 Miss. 737; Floyd v. Ricks, 14 Ark. 286; Underwood v. Campbell, 14 N. H. 393;

³ Pillow v. Roberts, 13 How. (U. S.) 473; Carter v. Burley, 9 N. H. 558.

Taylor v. Morton, 5 Dana (Ky.), 365; McCabe v. Hunter, 7 Mo. 355.

² 3 Coke, Inst. 169; Warren v. Lych, 5 Johns. (N. Y.) 245.

⁴ Turner v. Field, 44 Mo. 382. This is a very instructive case on this subject and contains some very ingenious arguments.

was intended for a seal.¹ Where a scrawl is allowed for a seal, the word "seal" at the end of the maker's signature, and referred to in the testimonium clause, creates a sealed instrument; the word "seal" is equivalent to a scrawl.² And, generally, an instrument will be treated as sealed when the intent to affix a seal is clear.³

9. *Attestation.*

Nature and effect.—A deed is fully executed, in the legal sense of the term, when it has been signed, sealed and delivered. No other acts were required at common law, and the deed was considered complete when this had been accomplished. Attesting witnesses were frequently employed, but only for the purpose of preserving the evidence;⁴ they were not considered necessary to give validity to the conveyance, and proof of the handwriting of the party was deemed sufficient whenever the execution of the instrument was called in question.⁵

In many of the states the common-law doctrine has been retained, and no witnesses are required; in others a witness or witnesses are necessary where the deed has never been acknowledged, or to make proof of same; while in others a peremptory mandate of the statute requires one or more witnesses to impart legal validity to the conveyance. When required at all, attestation is usually a prerequisite to registration, and any informality in this respect deprives the instrument of its legal effect as constructive notice.⁶

¹ Haseltine v. Donahue, 42 Wis. 576; Hudson v. Poindexter, 42 Miss. 304; Glasscock v. Glasscock, 8 Me. 577; Cummings v. Woodruff, 5 Ark. 116.

² Groner v. Smith, 49 Mo. 318; Lewis v. Overby, 28 Gratt. (Va.) 627.

³ Burton v. Le Roy, 5 Sawyer (U. S.), 510; McCarley v. Super-

visors, 58 Miss. 749; Mining Co. v. Bonanza Co., 16 Nev. 302.

⁴ See 2 Black. Com. 307; Cruise, Dig., tit. 32, ch. II; Dole v. Thurlow, 12 Met. (Mass.) 157.

⁵ Woods, Conv. 239. And see Meuley v. Zeigler, 23 Tex. 88; Thacher v. Phinney, 7 Allen (Mass.), 149.

⁶ Ross v. Worthington, 11 Minn. 441.

The usual attestation of a subscribing witness is that the deed was "signed, sealed and delivered" in his presence. It is not necessary, however, that a witness should have seen the party sign or have been present at the moment of signing; and if the party acknowledges his signature to the witness and requests him to attest it, this will be deemed sufficient.¹

A deed attested by subscribing witnesses will be presumed to have been duly witnessed;² and usually, if it has been acknowledged, although there appears to have been subscribing witnesses, it will not be necessary to call them.³ In the absence of acknowledgment, however, subscribing witnesses are material, whenever the deed is called in question, for the purpose of proving execution; and in such event the testimony of the witness authenticating his own signature is usually all that is required.⁴

10. *Acknowledgment.*

Generally considered.—In the United States deeds of land are authenticated by a solemn declaration of the grantor before a magistrate, technically called an *acknowledgment*. When so made the certificate of such fact by the officer furnishes authority for the production of the instrument in evidence without other or further proof of its execution.⁵

The certificate of acknowledgment is no part of the conveyance, however; neither is it the act of either party to it;⁶ and although a deed is defectively acknowledged, or even not acknowledged at all, if made by parties who are *sui juris*, it is still valid and effectual as between the parties and subsequent purchasers with actual notice, and passes title

¹ Cruise, Dig., tit. 32, ch. II; 1 Greenl. Evid., § 569a.

² Hrouska v. Janke, 66 Wis. 252.

³ Simmons v. Haven, 101 N. Y. 427.

⁴ Russell v. Coffin, 8 Pick. (Mass.) 143.

⁵ This is statutory, but the text states the general statutory rule.

⁶ Harrington v. Fish, 10 Mich. 415; Gray v. Ulrich, 8 Kan. 112.

equally with one duly acknowledged and certified.¹ The certificate cannot affect the force of the instrument,² but is only evidence in regard to its execution, affording *prima facie* proof of facts which, in its absence, may be established by other evidence. It is, however, a prerequisite for registration in a majority of the states, and a necessary incident to every conveyance designed to furnish constructive notice under the recording acts.³

The formality of acknowledgment has been rendered extremely simple of late years, and a substantial compliance with the statute prescribing its form and character is all that is required in an ordinary certificate.⁴ Courts are always inclined to construe clerical errors liberally;⁵ and it is the policy of the law to uphold certificates whenever substance is found, and not to suffer conveyances, or proof of them, to be defeated by technical or unsubstantial objections;⁶ and in construing such certificates resort may always be had to the deed or instrument to which they are appended.⁷ On the other hand, nothing will ordinarily be presumed in favor of a certificate, which should state all the facts necessary to a valid official act.⁸

Requisites of acknowledgments.—The right to take and certify acknowledgments is wholly statutory, and can be exercised only by such officers as are expressly or impliedly designated. A grantee, notwithstanding he may be otherwise qualified, is not competent to take the acknowledgment

¹ Stevens v. Hampton, 46 Mo. 404; Hay v. Allen, 27 Iowa, 208.

² Dale v. Thurlow, 12 Met. (Mass.) 157.

³ Pringle v. Dunn, 37 Wis. 449; Bass v. Estill, 50 Miss. 300; Willard v. Cramer, 36 Iowa, 22.

⁴ Russ v. Wingate, 30 Wis. 440; Calumet Co. v. Russell, 68 Ill. 426; Ogden v. Waters, 12 Kan. 282; Jacoway v. Gault, 20 Ark. 190.

⁵ Scharfenburg v. Bishop, 35 Iowa, 60; Hartshorn v. Dawson, 79 Ill. 108; Sanford v. Bulkley, 30 Conn. 344.

⁶ Wills v. Atkinson, 24 Minn. 161; Kelly v. Calhoun, 95 U. S. 710.

⁷ Tubbs v. Gatewood, 26 Ark. 128; Barnet v. Praskauer, 62 Ala. 486.

⁸ Witmore v. Laird, 5 Biss. (C. Ct.) 160; Knight v. Smith, 1 Oreg. 276; Meddock v. Williams, 12 Ohio, 377.

of his grantor,¹ nor can a grantor take his own acknowledgment.²

The certificate should be signed by the certifying officer³—the insertion of his name in the body of the certificate is not enough;⁴ and, while it has been held that a seal is not essential to a valid official act unless required by express statute,⁵ yet, if the statute does prescribe this requirement, he must affix the same.⁶ In some states a deed without a seal to the notary's certificate of acknowledgment is inadmissible as evidence.⁷

In every instance the certificate should show on its face that it was made at some assignable locality, and within the jurisdiction of the certifying officer.⁸ This is accomplished by a note of the county and state, called the *venue*, immediately preceding the certificate proper, together with the usual "ss," or *scilicet*, which literally means, "let it be known," or "be it known that in the state of —, at the county of —," etc. The use of the venue in legal writings cannot safely be dispensed with, for, although technical, yet it is sure and certain. The omission of venue, where there is nothing in the certificate to show where the officer who took the acknowledgment resided and acted, is generally a fatal defect.⁹

It does not appear that a date is essential,¹⁰ even though the statutory form may provide for same.¹¹ The date may be supplied by resorting to the deed itself.¹²

¹ Beaman v. Whitney, 22 Me. 413;

Wasson v. Conner, 54 Miss. 351;

Groesbeck v. Seeley, 13 Mich. 329.

² Kimball v. Johnson, 14 Wis. 674.

³ Carlisle v. Carlisle, 78 Ala. 542.

⁴ Marston v. Brashaw, 18 Mich. 81.

⁵ Harrison v. Simmons, 55 Ala.

510; Farman v. Buffam, 4 Cush.

(Mass.) 260; Thompson v. Morgan,

6 Minn. 261.

⁶ Little v. Dodge, 32 Ark. 453;

Buell v. Irwin, 24 Mich. 145.

⁷ See Meskimen v. Day, 35 Kan. 46.

⁸ Montag v. Linn, 19 Ill. 399.

⁹ Vance v. Schuyler, 1 Gilm. (Ill.) 160; Hardin v. Kirk, 49 Ill. 153.

But see Graham v. Anderson, 42 Ill. 514.

¹⁰ Irving v. Brownell, 11 Ill. 402;

Rackleff v. Norton, 19 Me. 274.

¹¹ Hobson v. Kissam, 8 Ala. 357.

¹² Bradford v. Dawson, 2 Ala. 203; Kelly v. Rosenstock, 45 Md. 389.

The two indispensable elements of a certificate of acknowledgment consist of (1) the identification of the party whose act it purports to be, and (2) a statement of the fact of acknowledgment. Unless the person offering to make the acknowledgment is personally known to the certifying officer to be the real person who executed the conveyance, or shall be proved to be such by a credible witness, such officer has no authority to take or certify same. This fact of identity must appear in the certificate, and a substantial compliance with this requisite is an indispensable element of validity.¹ So, too, the fact of acknowledgment must be stated. It must appear that the parties affirmed the execution of the instrument as their free and voluntary act. But in this, as in the former instance, form is not material, provided substance is found.²

Ancient deeds.—Deeds more than thirty years old are called *ancient deeds*, and are exempt from the usual tests applied to conveyances, being admitted in evidence without proof of execution;³ and where a deed would be evidence as an ancient deed without proof of its execution, the power under which it purports to be executed will usually be presumed.⁴

11. *Delivery.*

General principles.—To constitute a valid transfer of the title to land by grant there must be a delivery of the deed or instrument purporting to convey same.⁵ This is regarded as the final act which consummates and confirms the conveyance, without which all other formalities are ineffectual;⁶ and though a deed may be duly executed, and in all

¹ Fryer v. Rockefeller, 63 N. Y. 109; Gardner v. Grannis, 57 Ga. 268; Fogarty v. Finlay, 10 Cal. 239; 539.

Gove v. Cather, 23 Ill. 634; Brinton v. Seevers, 12 Iowa, 389.

² See Bryan v. Ramirez, 8 Cal. 461; Short v. Conlee, 28 Ill. 219; Cabell v. Grubbs, 48 Mo. 353.

³ Whitman v. Heneberry, 73 Ill.

⁴ Johnson v. Shaw, 41 Tex. 428.

⁵ Mitchell v. Bartlett, 51 N. Y. 447; Fisher v. Beckwith, 30 Wis. 55; Oliver v. Stone, 24 Ga. 63; Armstrong v. Stovall, 26 Miss. 275.

⁶ Williams v. Baker, 71 Pa. St.

other respects perfect, yet, while remaining undelivered in the hands or under the control of the grantor, it passes no title.¹ To impart validity there must be a manifestation, either by act or declaration, of an intention on the part of the grantor to give, and a reciprocal intention on the part of the grantee to take, and it is only by the joint concurrence of these intentions that the devolution of title becomes complete.²

The theory of delivery.—No small degree of the importance attached to the delivery of the deed in modern conveyancing arises from the fact that the deed has taken the place of the ancient livery of seizin of feudal times, when, in order to give effect to the enfeoffment of the new tenant, the act of delivering possession in a public and notorious manner was the essential evidence of the investiture of the title to the land. This became gradually diminished in importance, until the manual delivery of a piece of the turf, and many other symbolical acts, became sufficient. When all this passed away and the creation and transfer of estates in land by a written instrument, called the act or deed of the party, became the usual mode, the instrument was at first delivered on the land in lieu of livery of seizin,³ until finally any delivery of the deed, or any act which the party intended to stand for such delivery, became effectual to pass the title.⁴

Manner of delivery — Presumptions.—While delivery is essentially a solemn observance, it is by no means a formal one, and no particular act or set phrase of speech is necessary to constitute a legal transfer. A valid delivery may

476; *Borland v. Walrath*, 33 Iowa, 476; *Woodbury v. Fisher*, 20 Ind. 388; 130; *Howland v. Blake*, 97 U. S. 624. *Parker v. Hill*, 8 Met. (Mass.) 447. ³*Shep. Touch.* 64; *Coke*, Litt.

¹*Byars v. Spencer*, 101 Ill. 427; 266b.

Egery v. Woodard, 56 Me. 45; *Fisher v. Hall*, 41 N. Y. 416.

²*Cline v. Jones*, 111 Ill. 563; ⁴See *Church v. Gilman*, 15 Wend. (N. Y.) 656; *Warren v. Levitt*, 11 Foster (N. H.), 340; *Hatch v. Hatch*, 9 Mass. 306.

be effected by simply handing the deed to the grantee,¹ or to some third person for him,² with the intention of passing title and relinquishing all power and control over the instrument itself;³ or it may be legally delivered without being actually handed over, provided that by declaration, or other act, it may be inferred that the grantor intended to part with the title.⁴ So, too, if a deed has once been delivered, its retention by the grantor will not invalidate the same nor affect the title of the grantee.⁵

The attestation clause of the subscribing witnesses usually recites that the conveyance was "signed, sealed and delivered," etc., but this has been held not in itself sufficient to establish a delivery.⁶

The recording of a deed not only affords *prima facie* evidence of its delivery,⁷ but, when properly executed and acknowledged, raises a legal presumption of that fact,⁸ and, where to the grantee's advantage, of its acceptance as well;⁹ and where the grantor in a deed not actually delivered causes the same to be recorded, it has been held a sufficient delivery to enable the grantee to hold the land as against the grantor and those claiming under him.¹⁰ Generally a deliv-

¹ *Bogie v. Bogie*, 35 Wis. 659.

² *Hendrichsen v. Hodgen*, 67 Ill. 179; *Stephens v. Rhinehart*, 72 Pa. St. 434; *Brown v. Brown*, 66 Me. 316.

³ *Weber v. Christen*, 121 Ill. 91.

⁴ *Tallman v. Cooke*, 39 Iowa, 402; *Walker v. Walker*, 42 Ill. 311.

⁵ *Wallace v. Berdell*, 97 N. Y. 13; *Burkholder v. Cased*, 47 Ind. 418; *Thomas v. Groesbeck*, 40 Tex. 530.

⁶ *Ruslin v. Shield*, 11 Ga. 636. But see *Howe v. Howe*, 99 Mass. 88.

⁷ *Himes v. Keighblinger*, 14 Ill. 469; *Burkholder v. Cased*, 47 Ind. 418; *Kille v. Eye*, 79 Pa. St. 15; *Jackson v. Perkins*, 2 Wend. 308; *Lawrence v. Farley*, 24 Hun (N. Y.), 293; *Connard v. Colgan*, 55 Iowa, 538; *Moore v. Giles*, 49 Conn. 570.

⁸ *Kille v. Eye*, 79 Pa. St. 15;

Alexander v. Alexander, 71 Ala. 295. But see *Boyd v. Slayback*, 63 Cal. 493.

⁹ *Metcalfe v. Brandon*, 60 Miss. 685; *Masterson v. Cheek*, 23 Ill. 73.

While the recording of a deed for land may afford *prima facie* evidence of its delivery and acceptance, this must be understood as applying to a deed simply conveying the land, and not as applying to a deed which imposes an obligation upon the grantee to assume and pay a pre-existing incumbrance on the property. *Thompson v. Dearborn*, 107 Ill. 87.

¹⁰ *Kerr v. Birnie*, 25 Ark. 225; *Dale v. Lincoln*, 62 Ill. 22; *Palmer v. Palmer*, 62 Iowa, 470.

ery will be presumed, in the absence of direct evidence of the fact, from the concurrent acts of the parties recognizing a transfer of title.¹

Ordinarily a deed will be presumed to have been delivered on the day it bears date,² though this presumption is not conclusive.³ It has been held that where the date of acknowledgment is subsequent to the date of the deed, there is no presumption of delivery prior to the acknowledgment.⁴ The volume of authority, however, does not sustain this doctrine, and the date of execution, in the absence of other proof to the contrary, may still be taken as the true date of delivery,⁵ and not the date of acknowledgment, which, as a matter of convenience, may well have been made afterward.⁶ So, where a grantee dies between the dates of the deed and its acknowledgment, it will be presumed that the deed had been delivered in his life-time.⁷

Revocation and re-delivery.— Properly speaking, there can be no revocation of a deed which, being duly executed, has been actually or constructively delivered. By that act the title has passed beyond the grantor's control, and though

¹ Gould v. Day, 4 Otto (U. S.), 405. Thus, where a deed has been executed and recorded without the knowledge of the grantee, who subsequently executed a conveyance to a third party, this recognition by both parties of the transfer of the title was held to be sufficient evidence that at the time a delivery of the deed had been made. Ibid.

² Deininger v. McConnell, 41 Ill. 238; Treadwell v. Reynolds, 47 Cal. 171; Harman v. Oberdorfer, 33 Grat. (Va.) 497; Raines v. Walker, 77 Va. 92.

³ Whitman v. Henneberry, 73 Ill. 109.

⁴ Fontaine v. Savings Institu-

tion, 57 Mo. 553; Brolasky v. Furey, 12 Phill. (Pa.) 428. Washburn also announces the same principle. See 3 Wash. Real Prop. (4th ed.) 286.

⁵ Hardin v. Crate, 78 Ill. 553; Ellsworth v. Cent. R. R., 34 N. J. L. 93; Billings v. Stark, 15 Fla. 297; Breckenridge v. Todd, 16 Am. Dec. 83. The same doctrine is recognized and sanctioned by the English decisions under their statutes of enrollments. See, also, Shep. Touch. 72.

⁶ People v. Snyder, 41 N. Y. 402; Hardin v. Osborne, 60. Ill. 93. And see Fisher v. Butcher, 19 Ohio, 406.

⁷ Eaton v. Trowbridge, 38 Mich. 454.

he may still avail himself of the remedies which the law affords either for reformation, cancellation or rescission, the power of revocation no longer exists. The fact that after delivery the deed has been returned to the grantor, and by him retained, neither negatives nor disproves its previous delivery; nor will it destroy or in any way affect the title of the grantee as between the parties;¹ nor will the further fact that it has been canceled or destroyed while thus in the grantor's possession serve to divest title on the one hand or to re-invest it on the other;² notwithstanding such may have been the intention of the parties.³ The mere act of destroying the evidence of title can have no effect upon the title itself, and this being vested in the grantee he will continue to hold it as against the grantor.⁴

The grantee, however, although possessing the estate, having voluntarily, and without fraud or mistake, destroyed the legal evidence of his ownership, would, in case of an unrecorded deed, be left entirely without means by which he could afterwards establish or prove his title;⁵ and in such event the title, in a very restricted sense, may be said to have reverted, because the grantee is estopped to assert or prove it.⁶

Delivery in escrow.—Where a deed is delivered to a stranger, to be by him delivered to the grantee upon the performance of certain conditions, it is said to be in *escrow*. But the first or preliminary delivery is simply a device for the greater convenience of the grantor; it has no operation in law, and the escrow takes effect as a deed only from the

¹Thomas v. Groesbeck, 40 Tex. (Mass.) 231. But see Sawyer v. Peters, 50 N. H. 143.

Wallace v. Berdell, 97 N. Y. 13; ⁴Parker v. Kane, 4 Wis. 1; Albert v. Burbank, 25 N. J. Eq. Hentch v. Hentch, 9 Mass. 307; 404; Kimball v. Grey, 47 Ala. 230. Jeffers v. Philo, 35 Ohio St. 173.

²Warren v. Tobey, 32 Mich. 45; ⁵Parker v. Kane, 4 Wis. 1; Dukes Rogers v. Rogers, 53 Wis. 36; Tibeau v. Spangler, 35 Ohio St. 119.

³Reavis v. Reavis, 50 Ala. 60; ⁶Howard v. Huffman, 3 Head (Tenn.). 562; Speer v. Speer, 7 Ind. Chessman v. Whittemore, 23 Pick. 178; Farrar v. Farrar, 4 N. H. 191.

date of the second delivery; that is, from the date of its delivery to the grantee or some person in his behalf.¹ Prior to this event the estate, with all its incidents, remains in the grantor,² and in case of his death during the intervening period descends to his heirs;³ subject, of course, to the equitable rights of the purchaser.⁴ But while delivery is essential to render the deed effectual at law, it is in fact the performance of the conditions that imparts life and validity;⁵ and for this reason equity regards the title as vesting in the grantee whenever this has been done. In case the grantee dies, the subsequent performance of the condition vests title in his heirs.⁶

12. *Registration.*

General principles.—The system of registration practiced in the United States is unknown to the common law and essentially a creation of statute. It is probably derived from the English statute of enrollments, which was enacted to counteract the evil effects resulting from the practice of secret conveyances under the statute of uses. This statute provided that every bargain and sale of an inheritance or freehold should be by deed indented and enrolled within six lunar months from its date, either in one of the courts of Westminster, or before the justices and clerk of the peace in the county where the lands were situate. The enrolling of a deed did not make it a record, but it was recorded “to be kept in memory.”⁷

By the American system of registration, conveyances of any estate or interest in land, when duly recorded in con-

¹ Dyson v. Bradshaw, 23 Cal. 528; Smith v. Bank, 32 Vt. 341; Peter v. Wright, 6 Ind. 183; Everts v. Agnes, 4 Wis. 343.

² Jackson v. Rowland, 6 Wend. (N. Y.) 666; Cogger v. Lansing, 43 N. Y. 550.

³ Teneick v. Flagg, 29 N. J. L. 25; Cogger v. Lansing, 43 N. Y. 550.

⁴ Cogger v. Lansing, 43 N. Y. 550.

⁵ Hinman v. Booth, 21 Wend. (N. Y.) 267; Groves v. Tucker, 18 Miss. 9; State Bank v. Evans, 15 N. J. L. 155.

⁶ Lindley v. Graff, 37 Minn. 338.

⁷ Jacob's Law Dict. 457.

formity with the law of the state where such land is situate, have the dignity and effect of records, and to them much of the stability of our land titles is attributable. Such record not only serves as a means of preservation of the muniments and evidences of title, but also has the effect to give that notoriety to the transfer formerly obtained by livery of seizin, to which it is made equivalent in some of the states by statute.¹

The statutes of registration bear a close similitude in all the states, and provide generally for the recording of every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity.

Effect of recording acts.—It is a familiar provision of the recording acts that every conveyance which shall not be recorded as provided by law shall be void against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded; and further, that every instrument recorded in the manner prescribed by statute shall, from the time of filing same for record, impart notice to all persons of the contents thereof. It would seem, however, that the constructive notice afforded by the record of a deed applies only to those who are bound to search for it; as, subsequent purchasers, and all others who deal with or on the credit of the title, in the line of which the recorded deed belongs.² That such record imparts notice is to be understood also in the sense that the contents of the deed are correctly spread upon the record,³ for the recording acts cannot be made by equitable construction to embrace cases not within them, or to give

¹ Higbee v. Rice, 5 Mass. 344.

³ Terrell v. Andrew County, 44

² Maul v. Rider, 59 Pa. St. 167; Mo. 309; McLouth v. Hurt, 51 Tex. Corbin v. Sullivan, 47 Ind. 356; 115. Gillett v. Gaffney, 3 Colo. 351.

constructive notice of things the records do not show; and where a mistake is made in recording, a subsequent purchaser has a right, in the absence of actual notice of the mistake, to rely on the records as showing the exact facts.¹ But incorrect registration cannot avail a party who is not misled thereby.² The registry of an instrument not required by law to be recorded is notice to no one;³ and in the absence of statutory provisions to the contrary, a deed is not constructive notice, because copied into the registry, if it has not been duly executed, acknowledged or proved, so as to entitle it to registration,⁴ though such an instrument is effective as to all parties who have actual notice of its contents.⁵

Registration, in legal intendment, is conclusive notice to the parties to be affected by it. But notice of a prior unrecorded deed, communicated to a purchaser, will prevail over

¹Frost v. Beekman, 1 Johns. Ch. 288; Barnard v. Campau, 29 Mich. 162; Wait v. Smith, 92 Ill. 385. Compare Riggs v. Boylan, 4 Biss. 445. As was said by the court in Terrell v. Andrew County, 44 Mo. 309: "A person in the examination of titles first searches the records, and if he finds nothing there he looks to see if any instruments are filed and not recorded. If nothing is found, and he has no actual notice, so far as he is concerned the land is unincumbered. If he finds a conveyance, he goes no further; he never institutes an inquiry to find whether the deed is correctly recorded or the contents literally transcribed. Indeed, to attempt to prosecute such a search would be idle and nugatory."

This is a vexed question; the text states the preponderating view, but in several states a contrary doctrine is held. See Mari-

gold v. Barlow, 61 Miss. 593; Mines v. Mines, 35 Ala. 23; Throckmorton v. Price, 28 Tex. 605; Clader v. Thomas, 89 Pa. St. 343.

²Gaskill v. Badge, 3 Lea (Tenn.), 144.

³Galpin v. Abbott, 6 Mich. 17; Sigourney v. Larned, 10 Pick. 72.

⁴Loughridge v. Bowland, 52 Miss. 546; Pringle v. Dunn, 37 Wis. 449; Blood v. Blood, 23 Pick. 80; Bishop v. Schneider, 46 Mo. 472; Parrett v. Shabbut, 5 Minn. 323; Washburn v. Burnham, 63 N. Y. 132; Jones v. Roberts, 65 Me. 273.

⁵Bass v. Estill, 50 Miss. 300; Musick v. Barney, 49 Mo. 458; Musgrove v. Bonser, 5 Oreg. 313. Where upon the records a defective deed is found and is seen, this must be regarded as actual notice, such as every reasonable and honest man would feel bound to act upon. Hastings v. Cutler, 25 N. H. (4 Fost.) 483.

a subsequent recorded deed;¹ and as between the immediate parties no registration is necessary, an unrecorded deed having the effect to carry the legal title as against all persons having actual notice of its existence.²

Loss or destruction of records.—The obligation of giving the notice required by law rests upon the party holding the title, and if his duty is imperfectly performed, he, and not an innocent purchaser, must suffer the consequences;³ yet in a majority of the states that duty is effectively performed by filing the deed or instrument for record, and when this has been accomplished the party has done all that the law requires.⁴

Where a party has in all respects complied with the law, the total or partial loss or destruction of the record will not, it seems, impair any rights which may have accrued thereunder nor affect the constructive notice afforded by the filing or recording of the instruments, which still remain of binding force and effect upon subsequent purchasers.⁵ In the event of the destruction of the record, as well as of the original instrument, an abstract, shown to be made in the ordinary course of business and delivered to the parties interested in the land, is, as to such lost instrument, competent evidence of the facts therein recited, either by comity, or, in some states, by express enactment.⁶

Minor Incidents.

The date.—The date is no part of the substance of a deed,⁷ nor is it essential to its validity,⁸ the conveyance tak-

¹ Claiborne v. Holmes, 51 Miss. 146.

² Musgrove v. Bonser, 5 Oreg. 313.

³ Terrell v. Andrew County, 44 Mo. 309.

⁴ Riggs v. Boylan, 4 Biss. 445.

⁵ Meyers v. Buchanan, 46 Miss. 397; Gammon v. Hodges, 73 Ill. 140; Steele v. Boone, 75 Ill. 457.

⁶ Russell v. Mandell, 73 Ill. 126.

And see Weeks v. Dowling, 30 Mich. 4.

⁷ Jackson v. Schoonmaker, 2 Johns. 230; Meach v. Fowler, 14 Ark. 29; Costigan v. Gould, 5 Denio, 290.

⁸ Jackson v. Bard, 4 Johns. 230; Blake v. Fish, 44 Ill. 302; Thompson v. Thompson, 9 Ind. 323.

ing effect only from delivery,¹ but may become important in determining questions of priority, or in ascertaining whether all the statutory requirements at the time of its execution have been complied with. The date of a deed, in the absence of other proof, is presumed to be true date of its execution,² as well as delivery,³ and is the time from which title in the grantee should ordinarily be computed.⁴ As deeds are now drawn, the date usually forms the initial recital in the premises, though it may frequently be found in the *testimonium* clause, and in case of discrepancy the latter should, it seems, be taken as the true date.⁵ Though the expressed date of a deed is immaterial to its operation and effect,⁶ and may under ordinary circumstances be contradicted or explained,⁷ yet when taken in connection with conditions or stipulations annexed to the grant, it may become important in fixing the time for the performance of any act by grantor or grantee, and in such case cannot be varied by parol.⁸ Should the instrument be without date, the date of acknowledgment may be presumed to be also that of execution and delivery.⁹

Words of grant.—The operative words of conveyance are placed in the premises of a deed and are called *words of grant*. Formerly much importance was attached to these words, each of which possessed a specific significance, and it is still a common practice for the conveyancer to insert in deeds all the operative terms used in transferring land, as “grant, bargain, sell, remise, release, alien, convey and confirm,” though their presence, save where they imply cove-

¹Thatcher v. St. Andrew's Church, 37 Mich. 264; Whitaker v. Miller, 83 Ill. 381.

²Darst v. Bates, 51 Ill. 439; Smith v. Porter, 10 Gray, 66.

³Hardin v. Crate, 78 Ill. 553.

⁴Breckenridge v. Todd, 61 Am. Dec. 83.

⁵Morrison v. Caldwell, 5 T. B. Mon. (Ky.) 436.

⁶Harrison v. Trustees of Phillips Academy, 12 Mass. 456.

⁷2 Black. Com. 304.

⁸Joseph v. Bigelow, 4 Cush. (Mass.) 82.

⁹Gorman v. Stanton, 5 Mo. App. 585.

nants, is no longer necessary. This was formerly done that the instrument might take effect in one way if not in another, and in such case the party receiving the deed had his election which way to take it. Thus, according to the words used, he might claim either by grant, feoffment, gift, lease, release, confirmation or surrender. The words of grant of most frequent occurrence are "grant,¹ bargain and sell," and in many of the states, when not limited by express words, they are construed as express covenants;² while in other states such a conveyance, without more, would be a mere quitclaim and inoperative to convey an after-acquired title,³ or warrant that conveyed.⁴

Technical words of grant possess little of their former efficacy, though it is still true that to constitute a conveyance there must be sufficient words showing an intention to grant an estate;⁵ yet every part of the instrument may be resorted to for the purpose of ascertaining its true meaning and the intention of the parties,⁶ and, generally, any writing that sufficiently identifies the parties, describes the land, acknowledges a sale of vendor's rights for a valuable consideration, and is signed, sealed and delivered, is a good deed of bargain and sale,⁷ and, if complete in other respects, has been held to constitute a valid conveyance, even though all words of grant are omitted.⁸

¹The word "convey" is equivalent to "grant." *Lambert v. Smith*, 9 Oreg. 185.

²*Brodie v. Watkins*, 31 Ark. 319; *Hawk v. McCullough*, 21 Ill. 220. This construction is usually made under peculiar statutory provisions.

³*Butcher v. Rogers*, 60 Mo. 138; *Nicholson v. Caress*, 45 Ind. 479.

⁴*Taggart v. Risley*, 4 Oreg. 235. The word "give" was formerly held, in the absence of express covenants, to constitute a warranty

during the life of the grantor. *Dow v. Lewis*, 4 Gray (Mass.), 468.

⁵*McKinney v. Settles*, 31 Mo. 541; *Brewton v. Watson*, 67 Ala. 121; *Brown v. Manter*, 21 N. H. 528.

⁶*Saunders v. Hanes*, 44 N. Y. 353; *Callins v. Lavalley*, 44 Vt. 230; *American Emigrant Co. v. Clark*, 62 Iowa, 182.

⁷*Chiles v. Conley's Heirs*, 2 Dana (Ky.), 21.

⁸*Bridge v. Wellington*, 1 Mass. 219. This case has been severely

The habendum.—The *habendum* of a deed, though formerly, like many other technical features, of great importance, has now degenerated into a mere form,¹ and in the statutory conveyances now in use in many of the states is entirely omitted. In general the *habendum* refers to the premises and declares what estate the grantee shall hold. It may sometimes enlarge or diminish the grant, when showing a clear intention so to do,² but cannot perform the office of divesting the estate already vested by the deed, and is void if repugnant thereto.³ Where the deed purports to create a vested or contingent remainder, or conveys property in trust, the *habendum* becomes important; and where no estate is mentioned in the granting clause it becomes efficient to declare the intention and rebut any implication which would otherwise arise from the omission.

Validity — Construction.—The general construction of deeds is favorable to their validity, and although courts cannot give effect to an instrument so as to do violence to the rules of language or of law, they will yet so construe it as to bring it as near to the actual meaning of the parties as the words they have seen fit to employ and the rules of law will admit.⁴ The intention of the parties, when it can be ascertained, will always control, if by law it may, and as between them the deed is always construed most strongly against the grantor.⁵ When the words of a deed are so uncertain that the intention of the parties cannot be discovered,

criticised in subsequent decisions and frequently rejected. The general rule is that the deed should contain apt words of grant, release or conveyance. See *Johnson v. Bantock*, 38 Ill. 111; *Hammelman v. Mounts*, 87 Ind. 178.

¹ 4 Kent, Com. 468; 4 Black. Com. 298.

² *Corbin v. Healy*, 20 Pick. 514.

³ *Riggin v. Love*, 72 Ill. 553; *Hali-*

fax v. Stark, 34 Vt. 243; *Robinson v. Payne*, 58 Miss. 690.

⁴ *Callins v. Lavalley*, 44 Vt. 230; *Churchill v. Reamer*, 8 Bush (Ky.), 256; *Peckham v. Haddock*, 36 Ill. 38; *Hadden v. Shoutz*, 15 Ill. 531; *Jackson v. Meyers*, 2 Johns. 395.

⁵ *City of Alton v. Transportation Co.*, 12 Ill. 38; *Jackson v. Hudson*, 3 Johns. 375.

the deed is void.¹ In the exposition of deeds, the construction must be upon the whole instrument, and with a view to give every part of it meaning and effect, and the intent when apparent, and not repugnant to any rule of law, will control technical terms.²

Where there is a disagreement or inconsistency between two or more clauses of a deed, it is a general rule that the earlier clause will prevail if the inconsistency be not so great as to avoid the instrument for uncertainty.³ This rule is always applied where an estate is expressly granted, and which is followed by a reservation, exception or condition which destroys the grant.⁴ In the matter of description, where there is a clear repugnance, effect will always be given to that which is most definite and certain, and which will carry out the evident intention of the parties.⁵

The question of validity, in most cases, rests upon extraneous evidence. The principal facts which tend to invalidate deeds, aside from defects of form or substance, which appear from inspection, are: incapacity of the parties; inadequacy of consideration; fraud in the inception; and undue influences or duress in the procurement,—all of which must, from their several natures, be shown by evidence *aliunde*, the conveyance upon its face being regular and the formalities of law having been fully complied with.⁶

There is an important distinction between void and voidable deeds, although the terms are often used indiscriminately. A deed absolutely void passes no title, while a deed which is voidable merely may be the foundation of an unimpeachable title in the hands of a subsequent purchaser

¹ Rollin v. Pickett, 2 Hill. 522; Jackson v. Rosvelt, 13 Johns. 97; Peoria v. Darst, 101 Ill. 671.

² Callins v. Lavalley, 44 Vt. 230; Saunders v. Hanes, 44 N. Y. 253.

³ Tubbs v. Gatewood, 26 Ark. 128.

⁴ Cutler v. Tufts, 3 Pick. 277; Pynchon v. Sterns, 11 Met. 304.

⁵ Wade v. Deray, 50 Cal. 376; Kruse v. Wilson, 79 Ill. 233.

⁶ A purchaser of land from a prior *bona fide* holder who acquired the legal title, as shown by the records, for a valuable consideration, without notice of any outstanding equity, will be protected against such equity, even though he himself had notice thereof. Peck v. Arehart, 85 Ill. 113.

without notice.¹ The term "void" is seldom, unless in a very clear case, to be regarded as implying a complete nullity; but it is, in a legal sense, subject to large qualifications in view of all the circumstances calling for its application and the rights and interests to be affected in a given case.² Statutes not infrequently declare acts void which the tenor of their provisions necessarily make voidable only. Deeds are seldom absolutely void, though they may be relatively so, and incapable of legal effect as between the parties, but in regard to the consequences to third persons the distinction is highly important.³

As respects subsequent purchasers without notice, the right or title conferred by a conveyance is to be determined by the instrument itself as recorded, and not by facts *in pais* or other instruments not recorded.⁴ Latent ambiguities and defects do not usually avoid the deed, and a deed intended to correct an error in a former deed by the same grantor will cure such defect, and take effect by relation as of the time when the erroneous deed was given, the same as if it had been reformed in equity.⁵

Technical phrases.—Whenever it is apparent that a grantor has used a technical word to express an idea different from its technical signification, a court will construe it according to the manifest intention of the grantor;⁶ but in ascertaining such intent, where the words employed are not technical, they must be taken in their usual acceptation.⁷

In conveyancing a large number of phrases have obtained

¹ Crocker v. Ballangee, 6 Wis. 645.

⁶ C. P. R. R. Co. v. Beal, 47 Cal.

² Brown v. Brown, 50 N. H. 538; 151.

Kearney v. Vaughn, 50 Mo. 284.

⁷ Bradshaw v. Bradshaw, 64 Mo.

³ Bromly v. Goodrich, 40 Wis. 131; Seylar v. Carson, 69 Pa. St. 81; Van Schaac v. Robbins, 36 Iowa, 201; Kearney v. Vaughn, 50 Mo. 284.

⁴ Miller v. Ware, 31 Iowa, 524; Peck v. Arehart, 95 Ill. 113.

⁵ Hutchinson v. Railroad Co., 41 Wis. 541.

334. It has been held, however, that a qualification of the quantity of a lot of land sold as "more or less" will cover any deficiency not so gross as to justify the suspicion of wilful deception or mistake amounting to fraud. Wyly v. Gazan, 69 Ga. 506.

currency, which practically neither add to nor detract from the force of that which precedes or follows, but are retained and used in much the same manner as numerous other incidents of modern deeds, rather for their supposititious efficacy than for any real utility. Of this class is the language "more or less," which is extensively used in deeds and contracts for the sale of land. This term must be understood to apply only to small excesses or deficiencies attributable to the variation of the instruments of surveyors, etc.¹ In like manner the words "known as," in a description in a deed, are a mere formula and have no restrictive effect.² "And all the buildings thereon," etc., have no legal signification.³ So, also, many phrases in the body of the deed are without force; as, the words "to his and their proper use and behoof," etc., following the words of limitation. These words have no particular meaning or effect in determining either the extent of the interest conveyed, or the nature and quality of the estate intended to be vested. In deeds of bargain and sale they serve no office whatever.⁴ Words and phrases similar to the foregoing detract nothing from the deed by their omission.

The intent, when apparent, and not repugnant to any rule of law, will always control technical terms; for the intent, and not the words, is the essence of every agreement.⁵

¹ *Benson v. Humphreys*, 12 Rep. 591.

³ *Crosby v. Parker*, 4 Mass. 110.

² *Kneeland v. Van Valkenburgh*, 46 Wis. 434.

⁴ *Jackson v. Cary*, 16 Johns. 302;

Brain v. Renshaw, 12 Rep. 622.

⁵ *Callins v. Lavalle*, 44 Vt. 230.

CHAPTER VI.

FORMS OF CONVEYANCE.

Generally considered.—Having duly considered the general nature of deeds, together with their “requisites” and “circumstances,” we may now proceed to examine the specific methods by which the transfer of estates and devolution of title is effected.

All of the various forms of deeds now in common use in this country derive their origin from the land and conveying system of Great Britain, and are but modifications of two species, one of which was developed by the common law, while the other was created under the operation of the statute of uses. From these two species the conveyancers evolved a number of divergent and complex forms,¹ characterized, in the main, by much ingenious subtlety and legal refinement. The tendency of modern legislation, however, as well as the current of later decisions, has been to simplify the forms of conveyance and to reduce the number of the methods, so that the technical principles relating to deeds and other writings of conveyance, of which the old books afford so many examples, have become in a great measure obsolete and inapplicable.

In the United States conveyances derive their effect from the statutes of the several states, and, as a general rule, no other or further formalities are required than those specific-

¹ The elementary writers classify common-law deeds as follows: Five original conveyances, to wit: Feoffment, Gift, Rent, Lease, Exchange and Partition; five derivative conveyances, to wit: Release, Confirmation, Surrender, Assignment and Defeasance; and five conveyances derived from the statute of uses, to wit: Covenant to stand seized to uses; bargain and sale; lease and release; deed to lead or declare the uses of other more direct conveyances; and deeds of revocation of uses. Willard, *Conveyancing*, 419; 3 Wash. Real Prop., ch. 5.

ally prescribed. It is further true, however, that in most instances these statutes expressly refer to the common-law forms, and, except in the case of what are known as "statutory forms," the ancient deeds, modified by time and circumstance, are still the effective means by which real property is transferred.

For purposes of convenience in the orderly treatment of the subject we may broadly classify conveyances as:

1. Governmental, or public.
2. Individual, or private.
3. Fiduciary, or official.

Under these three heads are comprehended all forms of conveyance.

1. *Governmental, or Public Conveyances.*

Forms of public grant.—Reference has heretofore been made to the methods employed in the original divesture of title by the government, the effect to be accorded to such methods, and the character of the title thereby acquired.¹ As we have seen, the primary conveyance of lands is accomplished by means of an act or resolve of the legislature, or by a formal instrument called a *patent*; but where the conveyance is of lands held by a derivative title, the operative instrument is not distinguishable, except in minor particulars, from deeds between individuals. So, too, where title in the state is acquired as the result of forfeiture, the instrument of conveyance may be, and generally is, a modification of some form of private grant.

In considering the various forms of conveyance by public grant, we may separate them into two general classes, based upon the specific character of the title by virtue of which the grant is made. Thus, we find that the government, both state and federal, holds lands as a sovereign proprietor, the title to which was acquired by conquest or purchase. Again, it may hold lands in the same paramount right, but derived

¹ See p. 81, *supra*.

through some summary exercise of its sovereign power in the way of forfeiture or confiscation. In either case the title, for all practical purposes, must be considered as original, but the methods, both of acquisition and transfer, are entirely dissimilar. The former, then, we may not inaptly style as (a) *proprietary lands*; the latter as (b) *forfeited lands*, and treat them accordingly when describing the forms of alienation.

(a) *Public Conveyances of Proprietary Lands.*

Generally.—A public conveyance, in the sense contemplated by this work, was by the common law denominated a *king's grant*, and was always made by matter of record, as distinguished from an assurance by deed, even though the grant was further evidenced by charter or patent. In the United States this principle has largely been retained, and public divesture of title may still be properly said to be by matter of record, whatever may be the form of the operative instrument of conveyance. Like the king's grants, it may be by charter or patent, executed by the executive or ministerial officers of government; or it may be the act of the legislature representing the sovereignty of the people, and requiring no other or further evidence than the record of such act.

Patents defined.—A patent has been defined as a grant of some privilege, property, or authority, made by the government or sovereign of a country to one or more individuals, and the term, as originally used in England, is said to have signified certain written instruments emanating from the king, and sealed with the great seal. These instruments conferred grants of lands, honors, or franchises, and were called letters patent from being delivered open, and, by way of contradistinction from instruments which went out closed or sealed.¹ In the United States the word is used to denote those instruments which secure to inventors, for a limited

¹ 2 Bouv. Law Dict. 298.

time, the exclusive use of their inventions; but when employed in connection with real property, it means the title deed by which a government, either state or federal, conveys its lands.

Patents from the United States.—A patent of the United States is the conveyance by which the nation passes its title to the public domain, and is the highest evidence of title known to the law; it is conclusive as against the government, and all claiming under junior patents or titles, until set aside or annulled by some competent tribunal.¹ When delivered to and accepted by the grantee, it passes the full legal title to the land,² and carries with it the presumption that all the prerequisites of law have been complied with.³

But the patent must show upon its face a regular issue and a full compliance with the formalities of law, for a patent forms no exception to the rule that the legal title to lands can be conveyed only in the form provided by law.⁴ The principal requisites in this respect have reference mainly to execution and authentication. To conform strictly to the letter of the law, the patent must be signed in the name of the president, either by himself or his duly appointed secretary, sealed with the seal of the general land office, and countersigned by the recorder. Until all of these have been done, the United States has not executed a patent for a grant of lands. Each and every one of the integral parts of the execution is essential to the perfection of the patent. They are of equal importance under the law, and one cannot be dispensed with more than another. Neither is directory, but all are mandatory; and neither the signing nor the sealing nor the countersigning can be omitted any more than

¹ *United States v. Stone*, 2 Wall. 525; *Strong v. Lehmer*, 10 Ohio St. 93; *Stoddard v. Chambers*, 2 How. 284.

² *Moore v. Robbins*, 6 Otto, 530; *Le Roy v. Jamison*, 3 Saw. (C. Ct.) 369.

³ *Sweat v. Corcoran*, 37 Miss. 513; *Hill v. Miller*, 36 Mo. 182; *Collins v. Bartlett*, 44 Cal. 371; *Winter v. Crommelin*, 18 How. 87; *Stringer v. Young*, 3 Pet. 320.

⁴ *McGarrahan v. New Idria Mining Co.*, 96 U. S. (6 Otto), 316.

the signing or the sealing or the acknowledgment by a grantor, or the attestation by witnesses, when by statute such forms are prescribed for the due execution of deeds by private parties for the conveyance of lands.¹

Continued — Delivery.— Unlike conveyances between individuals, a formal delivery of a patent is not essential to its validity, nor will non-delivery defeat the grant.² The modern doctrine of delivery derives much of its importance from the ancient livery of seizin. No livery of seizin, however, was necessary of the king's grants, which were made matters of record, for when the seal was affixed to the instrument and enrollment of it was made, no higher evidence could be had, nor was any other evidence necessary of this act or deed of the king. In like manner when a patent for public lands has been made out and signed by the president, the seal of the United States affixed, and the instrument countersigned by the recorder of the land office and duly recorded in the record book kept for that purpose, it becomes a solemn public act of the government of the United States and needs no further delivery or other authentication to make it perfect and valid.³ In such case the title to the land conveyed passes by matter of record to the grantee, and delivery, as in case of private individuals, is not necessary to give effect to the granting clause of the instrument.⁴

Theoretically, in order that a patent may take effect as a conveyance, it is essential that there be an acceptance on the part of the grantee; but the acts required to be done by him

¹ McGarrahan v. Mining Co., 96 U. S. 316.

² It is the practice of the general land office to transmit patents, as rapidly as completed, to the various local offices for delivery on surrender of the duplicate receipt or certificates. Frequently, however, they remain uncalled for, and on the discontinuance of a local office all undelivered patents

remaining in its files are returned to the general land office where they are assorted, filed and preserved. See Rep. General Land Office, 1875.

³ Gilmore v. Sapp, 100 Ill. 297.

⁴ United States v. Schurz, 102 U. S. 378; Le Roy v. Jamison, 3 Saw. (C. Ct.) 369; Houghton v. Hardenberg, 53 Cal. 181.

in the preparation of his claim are equivalent to a positive demand for the patent, and where the patentee does not expressly dissent, his assent and acceptance are always presumed from the beneficial nature of the grant.¹

Some confusion has arisen as to the time when a patent takes effect, that is, when it becomes operative as a conveyance, and binding upon both parties, from not distinguishing between acts which bind the government and acts which bind the patentee. No one can be compelled by the government, any more than an individual, to become a purchaser, or even to take a gift. Nor can the burdens or advantages of property be thrust upon him without his assent, and the patent of government, like the deed of a private person, must, in order to take effect as a conveyance, and transfer title, be accepted by the grantee; yet, as we have seen, the possession of property is so universally considered a benefit, that, in the absence of express dissent, an acceptance is presumed whenever the conveyance is placed in condition for acceptance, and this occurs when the last formalities required by law of the officers of the government are complied with. By the execution, sealing and recording, open and public declaration is made that, so far as the government is concerned, the title to the premises has been transferred to the grantee. The record stands in place of the offer for delivery in the case of a private deed; and the instrument is thenceforth held for the grantee, who takes in such case by matter of record.²

General land office record.—Patents do not come within the provisions of the recording laws of the state, where the terms of the statute do not specifically include them,³ though it is usual to record them in the county where the land is situate, and such registration, as a rule, is expressly permitted

¹ *Pierre Mutelle Case*, 3 Op. Att'y- 369; *Green v. Liter*, 8 Cranch (U. S.), Gen. 654; *Le Roy v. Jamison*, 3 Saw. 247; *Gilmore v. Sapp*, 100 Ill. 297. (C. Ct.) 369.

³ *Moran v. Palmer*, 13 Mich. 367;

² *Le Roy v. Jamison*, 3 Saw. (C. Ct.) *Curtis v. Hunting*, 6 Iowa, 536.

by statute. The act for the establishment of a general land office provides that all patents issuing from that office "shall be recorded in said office in books to be kept for the purpose," and the indorsement of such record will always be found upon the patent.

This original record is not in itself a grant of title, but it is an evidence of equal dignity with the patent, because, like the patent, it shows that a grant has been made. The record called for by act of congress is made by copying the patent to be issued into the book kept for that purpose, and such record, as a matter of evidence, stands in the same position and has the same effect as the instrument of which it purports to be a copy.¹ The public records of the departments of the government are not, like those kept pursuant to ordinary registration laws, intended for notice, but for preservation of the evidence of the transactions of the department.

Construction.—It is a rule of general application to public grants that such grants are to be construed most favorably to the public and most strongly against the grantee; that nothing passes by same except what is expressed in unequivocal language, and that whatever is not unequivocally granted is deemed to be withheld, nothing passing by implication. In late cases, however, it has been held that this rule does not apply, at least to its full extent, to grants made upon adequate valuable consideration, but refers rather to gratuitous grants made by the sovereign upon the solicitation of the grantees.²

But little room for construction will ordinarily be found in patents, and when rules of construction are invoked it is

¹ McGarrahan v. New Idria Mining Co., 6 Otto, 316; Sands v. Davis, 40 Mich. 14.

² Langdon v. New York, 93 N. Y. 129; Charles River Bridge v. Warren Bridge, 7 Pick. (Mass.) 344. The reason generally given for the

rule is, that in a grant proceeding from the application of the subject, the grantee ought to know what he asks, and if that does not appear, nothing shall pass from the sovereign by reason of the uncertainty.

usually to determine matters relating to description. In such cases it has been held that the entire description of the lands given in the patent must be taken together, and the identity of the land ascertained by a reasonable construction of the language used. If, however, there be a repugnant call, which by other calls of the patent clearly appears to have been made through mistake, the patent will still be valid and the ambiguity or doubt which may arise may be explained in the same manner and under the same rules that obtain between private grantors and grantees.¹

Patents from the state.—Much that has been said with reference to patents from the federal government will apply to patents from the state. The formalities incident to such patents have reference mainly to statutory requisites relative to issuance and execution; and while the instruments closely follow the forms adopted by the national government, minor differences of detail will be found varying with the locality. Ordinarily a state patent, analogous to those issued by the general government, is under the hand of the chief magistrate and authenticated by the great seal. Such a course is, however, by no means uniform, the statute often prescribing other and different formalities.²

Legislative grants.—A grant of land by statute is the highest and strongest form of title known to our law,³ and

¹ Boardman v. Reed, 6 Pet. (U. S.) 328; McIver v. Walker, 9 Cranch (U. S.), 173.

² Thus, in Wisconsin, the commissioners of school and university lands are alone authorized to convey such lands, and that power cannot be transferred to others; hence, a patent issued by the governor and secretary of state, although in conformity to the general statute regulating patents, would be void and inoperative to pass the title to that particular class of lands. McAbee v. Mazzuchelli, 13 Wis. 478. So,

too, in Illinois the canal lands are conveyed by the trustees of the canal, and in many states similar conditions will be found to prevail. In all cases of this kind the immediate grantors are usually first formally invested with title by the state, in which event they become, in effect, fiduciaries, and their deeds will fall under the head of official conveyances and be governed by the general rules which apply to this class of instruments.

³ 11 Opinions Att'y-Gen. 47.

does of itself, *proprio vigore*, pass to the grantee all the estate of the government except what is expressly excepted.¹ As a primary conveyance it is not in general use, for, as a rule, the government parts with its title only by patent; but when purporting to convey land in words of present grant, it vests a perfect and irrevocable title.²

Construction of legislative grants.—A legislative grant is an executed contract,³ and as such is within the clause of the constitution of the United States which prohibits the states from passing any law impairing the obligation of contracts. It cannot, therefore, be destroyed, and the estate divested by any subsequent legislative enactment. The rule applies with equal force to corporations as to individuals; and when the state enters into a contract with a municipal corporation, the subordinate relation of the corporation ceases, and that equity arises which exists between all contracting parties. The control of the legislature over the corporation can be exercised only in subordination to the principle which secures the inviolability of contracts.⁴ Congressional grants are governed by the same rules, and a grant by congress to a state cannot be recalled at the will of congress any more than a grant to an individual.⁵

Generally, in a conveyance by the sovereign of property which is usually the subject of private ownership, the extent of the thing granted is to be ascertained by the rules of construction applicable to private conveyances; yet in construing a congressional grant, it must be remembered that the act by which the grant is made is a law as well as a conveyance, and that such effect must be given to it as

¹ 9 Opinions Att'y-Gen. 253.

² *Strother v. Lucas*, 12 Pet. (U. S.) 454; *Terrett v. Taylor*, 9 Cranch (U. S.), 50; *Chouteau v. Eckhart*, 2 How. (U. S.) 372; *Swann v. Lindsey*, 70 Ala. 507; *Dean v. Bittner*, 77 Mo. 101.

³ *The Binghamton Bridge*, 3

Wall. (U. S.) 51; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 625; *Dingman v. People*, 51 Ill. 267.

⁴ *Grogan v. San Francisco*, 18 Cal. 590.

⁵ *Busch v. Donohue*, 31 Mich. 480; *Rice v. Railroad Co.*, 1 Bl. 353.

will carry out the intent of congress; and that the rules of the common law must yield in this, as in all other cases, to the legislative will.¹ Another exception will be observed, in that the ordinary rule construing the grant most strongly against the grantor is here reversed, and whatever is not given expressly, or very clearly implied from the words of the grant, is withheld.²

Formal requisites.—No particular terms are necessary in a grant by congress or the legislature,³ which will vary with the exigencies of each particular case. The usual operative words are “be, and hereby is, granted, confirmed,” etc.

(b) *Public Conveyances of Forfeited Lands.*

Generally considered.—The second class of conveyances by public grant, while comprehending all deeds or enactments made under the law relating to confiscation, forfeiture, eminent domain, etc., is confined mainly to deeds executed by virtue and in pursuance of the taxing power of the state. Sales and conveyances by order of courts, and which result from some regular action had therein, are frequently but erroneously called public grants. The mere fact that such conveyances are authorized and confirmed by legal tribunals does not, in any just sense, give to them the character of public grants, and the titles thus derived are strictly derivative. It is true they are made by authorized officers whose acts and functions are of a public nature, but in every instance, in the transfer of land, such officers are merely trustees and their conveyances but fiduciary acts. A public grant, in its proper signification, contemplates only that form of alienation in which the public in its organized capacity — the state — is the immediate grantor.

Nature of taxation.—Taxes are burdens or charges imposed by the legislative power, upon persons or property, to

¹ Railroad Co. v. Railroad Co., 97 Pa. St. 355; Railroad Co. v. Litchfield, 23 How. 88.

² Mayor, etc. v. Railroad Co., 26 ³ Coburn v. Ellenwood, 4 N. H. 99.

raise money for public purposes or to accomplish some governmental end.¹ This power is vested wholly in the legislature, though municipalities may exercise same by a special delegation of authority, and is unrestricted except when it is opposed to some provision of the federal or state constitution.² The right of taxation has for its foundation the principle that the citizen shall contribute to the support of the government which protects his person and property, in just proportion to the value of the property protected;³ and equality, so far as is practicable, is its distinguishing characteristic.⁴ While it is scarcely possible to attain absolute equality in all cases, or benefits commensurate with the burden of taxes imposed, yet the principle upon which the approximation to equality is to be maintained must be preserved inviolate in this: that all property subject to taxation shall be uniformly assessed according to value—a rule applicable to all taxation, whether for general, local or special purposes.⁵

The legislature, as we have seen, is the sole source and repository of the taxing power; the counties and other municipal divisions are mere auxiliaries of the government, established simply for the more effective administration of justice, and the power of taxation, as confided to them, is a delegated trust, and is to be strictly construed. They act, not by virtue of inherent power, but as mere agencies of the state.⁶

¹ *Hanson v. Vernon*, 27 Iowa, 28; *General v. Plankroad Co.*, 11 Wis. Mitchell v. Williams, 27 Ind. 62; 35. Blackw. Tax Tit. 1.

² *People v. Marshall*, 1 Gilm. (Ill.) 672; *Wider v. East St. Louis*, 55 Ill. 133.

³ *Dunleith v. Reynolds*, 53 Ill. 45; *In re Van Antwerp*, 56 N. Y. 265.

⁴ *Sherlock v. Village of Winnetka*, 60 Ill. 530; *Holbrook v. Dickinson*, 46 Ill. 285; *Weeks v. Milwaukee*, 10 Wis. 242; *Attorney-*

⁵ *Peay v. Little Rock*, 32 Ark. 31; *Chicago v. Larned*, 34 Ill. 253; *McCormack v. Patchin*, 53 Mo. 33; *Weeks v. Milwaukee*, 10 Wis. 242; *People v. Bradley*, 39 Ill. 130; *Ottawa v. Spencer*, 40 Ill. 211; *Attorney-General v. Plankroad Co.*, 11 Wis. 35; *Scens v. Racine*, 10 Wis. 371.

⁶ *Railroad Co. v. Washington County*, 30 Gratt. (Va.) 471; *United*

Tax sales.—Taxation, while an inherent right of government, is regulated in all states by express statutes which provide methods for the collection of the tax and the enforcement of payment, by sequestration of the property affected in case it is withheld. Whatever be the methods employed, the proceedings are summary in their nature and the requirements of law must be strictly pursued or the whole transaction will be void.¹ When special proceedings are authorized by statute, by which the estate of one man may be divested and transferred to another, the owner has a right to insist upon a strict performance of all the material requirements of the statute, especially those designed for his security, and the non-observance of which may operate to his prejudice.² It is not the policy of the law to deprive the citizen of his property by sales made on account of the government through its officers, who have no interest in the matter, without putting him wholly in fault in not complying with his obligations.³

Tax deeds.—Neither the legal nor equitable title to lands sold for non-payment of taxes vests in the purchaser until the execution and delivery of the tax deed.⁴ This deed does not operate *ipso facto* to transfer the title of the owner as in ordinary deeds between individuals, but is the last act of a series of proceedings upon the regularity of which it depends for its character and effect. It is not title in itself, nor, unless aided by statute, even evidence of it. Its recitals

States v. New Orleans, 98 U. S. (8 Otto), 381.

¹ Charles v. Waugh, 35 Ill. 315; Cahoon v. Coe, 57 N. H. 556; Clarke v. Rowan, 53 Ala. 401; People v. Biggins, 96 Ill. 481; Abbott v. Downing, 49 Mo. 302.

² Marsh v. Chestnut, 14 Ill. 223; Holbrook v. Dickinson, 46 Ill. 285.

³ Rivers v. Thompson, 43 Ala. 633. The lien of taxes is purely legal in

its character, the creature of the statute, not arising upon contract, and can be enforced in the mode provided by the law of its creation, and in no other manner. People v. Biggins, 96 Ill. 481.

⁴ Stephens v. Holmes, 26 Ark. 48; Insurance Co. v. Scales, 27 Wis. 640; Bracket v. Gilmore, 15 Minn. 245; Lake v. Gray, 35 Iowa, 44.

bind no one, and it creates no estoppel upon the former owner.¹

The mere production of the deed, in the absence of statutory aid, creates no presumption in its favor until all the anterior proceedings prescribed by law have been affirmatively shown to have been complied with, when it becomes conclusive evidence of title according to its extent and purport. This doctrine, which has long obtained in this country, is based upon the policy that it is better that the purchaser should lose the small amount of his bid rather than the owner should forfeit a valuable estate, where the proceedings show irregularity or illegality,² and the burden of proving title under tax deeds has been thrown upon him who asserts such title.

Continued — Statutory modifications.—Though the rule of the common law, that he who affirms the existence of a material fact must prove it, was for many years applied to sales for taxes in all its unbending rigidity until the astuteness of judicial refinement had rendered almost inoperative all legislation providing for such sales, a marked change is now apparent in many states. Stringent legislation has endeavored to counteract the tendency of judicial refinement by declaring the operation and effect of tax deeds, and such conveyances in a majority of the states, when formal and duly executed, are taken as *prima facie* or presumptive evidence of the regularity of all proceedings, from the listing or valuation of the land up to the issuance of the deeds; while a few states have gone so far as to declare such deeds conclusive evidence of every matter or fact required by law to make a good and valid sale and vest title in the purchaser, except the facts of exemption, non-payment and redemption, and as to those facts it is made *prima facie* evidence.³ This doctrine, however, has been expressly repu-

¹ Blackw. on Tax Titles, *364; Jackson v. Esty, 7 Wend. 148. ³ See Gwynne v. Neiswanger, 18 Ohio, 400; Allen v. Armstrong, 16

² Blackw. on Tax Titles, *68; Denning v. Smith, 3 Johns. Ch. 344; Jackson v. Morse, 18 Johns. 442. Iowa, 508.

diated by the courts as an unconstitutional confiscation of property, and the rule has been announced that the legislature can make a tax deed conclusive evidence of the regularity of prior proceedings only as to non-essentials or matters of routine which rest in mere expediency.¹ But the owner of property cannot be precluded from showing the invalidity of a tax deed thereto by proving the omission of any act essential to the due assessment of the same, the levy of a tax thereon, and the sale thereof on that account. As to the performance of these acts, and the facts necessary to constitute them, the deed can only be made *prima facie* evidence.²

It would seem to be well settled, however, that the legislature has the power to make a tax deed *prima facie* evidence of material facts, upon which the right to sell and convey depends, and when this has been done it has the effect to entirely change the burden of proof, relieving the purchaser therefrom and imposing it upon the person who attempts to controvert the deed;³ but whenever it is shown that any essential particular in the anterior proceedings has been irregular, the authorities are quite harmonious in declaring its *prima facie* character to be lost;⁴ and when the *prima facie* character, as established by statute, is overthrown, the common-law principles stated in the preceding section at once attach, and the person asserting the title must prove by satisfactory evidence the regularity of the proceedings.

¹ Acts which need not have been required in the first place — as the affidavit of the sheriff to the delinquent list — and which the legislature may by a curative act excuse when omitted. *Marx v. Hawthorn*, 12 Saw. (C. Ct.) 374.

² *Allen v. Armstrong*, 16 Iowa, 508; *MacCready v. Sexton*, 29 Iowa, 356; *Rally v. Guinn*, 76 Mo. 263; *Callanan v. Hurley*, 93 U. S. 387; *Steeple v. Dowing*, 65 Ind. 501.

³ *Biscoe v. Coulter*, 18 Ark. 423; *O'Grady v. Barnishee*, 23 Cal. 287; *Watson v. Atwood*, 25 Conn. 313; *Millikan v. Patterson*, 91 Ind. 515; *Clark v. Conner*, 28 Iowa, 311; *Hart v. Smith*, 44 Wis. 213.

⁴ *Sibley v. Smith*, 2 Mich. 486; *Graves v. Bruen*, 11 Ill. 431; *Turney v. Yeoman*, 16 Ohio, 24; *Rayburn v. Kuhl*, 10 Iowa, 92; *Thompson v. Ware*, 43 Iowa, 455.

The law declaring a tax deed *prima facie* evidence of title does not dispense with the statutory requirements which precede the sale, but only shifts the burden of proof from the party claiming under the deed to the party impeaching it.¹

Continued — Formal parts.— The form and substance of tax deeds is usually prescribed by statute, in which case a strict conformity is required or the deed will be void,² though if defective a new deed will usually issue to the person entitled,³ and the deed will not be avoided for slight irregularities or variances from the statutory form.⁴

The ordinary incidents of deeds attach to this class of conveyances, and in most respects they stand upon the same footing as deeds between individuals.⁵ To attempt an enumeration of the special distinctive features, however, would be impossible in this connection, as few subjects have been so harassed by legislative tinkering, both as to the methods of sale and its evidence, as the sale of land for taxes. But inasmuch as the deed does not derive its validity from its capacity as an independent conveyance to transfer the estate described in it, but from the existence of a power and compliance with prescribed conditions, it should show upon its face an acknowledgment of the power in pursuance of which it purports to have been executed.⁶ This rule is of

¹ Williams v. Kirtland, 13 Wall. 306.

² Chandler v. Spear, 22 Vt. 388; Boardman v. Bourne, 20 Iowa, 134; Kruger v. Knob, 22 Wis. 429. The form in such case becomes substance, and must be strictly pursued. Atkins v. Kinman, 20 Wend. 249.

³ Finley v. Brown, 22 Iowa, 538; Woodman v. Clapp, 21 Wis. 350.

⁴ Bowman v. Cockerill, 6 Kan. 311.

⁵ Blakely v. Bestor, 13 Ill. 708.

The construction of a tax deed in respect to the description of the land conveyed must be the same as if such description were used in a deed between private individuals. The doctrine of strict construction, as applied to the execution of naked statutory powers, has no application in such case. Blakely v. Bestor, 13 Ill. 708.

⁶ Blackw. Tax Tit. *368; Jackson v. Roberts, 11 Wend. 425; Tolman v. Emerson, 4 Pick. 160.

uniform operation everywhere. All the recitals provided by law, which go to show full compliance, are necessary and integral parts, and the failure to recite any one of the prerequisites to a valid sale will raise a presumption that the omitted requirement was not complied with.¹ The execution and authentication are purely matters of local statutory regulation.

The later forms of tax deeds prescribed by statute are very short and concise, and the recitals confined to a few material points, while their legal effect and operation is expressly defined as in case of deeds between individuals after statutory forms. The execution of the deed is confided to the county clerk or other officer having the custody of the tax records.

2. *Individual, or Private Conveyances.*

Defined and classified.—The different modes of alienation, or rather the legal evidences of the transmission of real property, were formerly known as *common assurances*, being the means whereby every man's estate was assured to him and all doubts or controversies respecting same either removed or prevented.² Assurances transacted between two or more private persons were called *deeds*, or matters *en pais* (in the country), and were so styled because, according to the old law, the assurance was given upon the very spot or piece of land to be transferred. Deeds were thus further distin-

¹ Long v. Burnett, 13 Iowa, 29; Lain v. Cook, 15 Wis. 446; Large v. Fisher, 49 Mo. 307. A ministerial officer, in making a return or recital as to how he executed a power, must set out the facts and the manner in which he performed the act, and let the court determine whether they comply with or are in accordance with the law. The sale of property for taxes is an *ex parte* proceeding. The officer acts at his own peril, and must perform every prerequisite required by statute before the title of a citizen to his property can be taken from him. The deed must show affirmatively that the law has been complied with in all particulars. Spurllock v. Allen, 49 Mo. 178; Abbott v. Doling, 49 Mo. 302; Annuan v. Baker, 49 N. H. 161.

² Cruise, Dig., tit 32, ch. I.

guished from assurances transacted only in the king's courts, which were called matters *of record*.

From very simple forms deeds eventually became highly technical, while the efforts of the conveyancers to defeat or counteract the effect of remedial laws introduced, in time, a large number of distinctive methods of conveyance. With the rest of our English inheritance, these methods have become a part of the common law of this country, and still find a practical employment in most, if not all, of the states. Except where the statute has prescribed a model, the old forms, modified to meet the exigencies of the times, are still used, and even where statutory forms are given, recourse must still be had to the old deeds in many instances.

The earliest forms of conveyance were those developed by the common law; but as the deeds which were subsequently framed under the statute of uses are those which form the basis of the American system of conveyancing, they properly claim our prior attention. In the succeeding paragraphs an attempt will be made to describe the nature, operation and effect of deeds of conveyance now in common use between individuals, and for convenience they may be classified as: (a) Conveyances derived from the *statute of uses*, and (b) conveyances derived from the *common law*. As adaptations of these two primary species we find: (c) Conveyances by *delegated authority*, either by power of attorney or appointment; (d) conveyances *in trust*, as where the legal estate is held by one for the use of another; (e) conveyances *by way of pledge*, as where lands are charged with a lien to secure the fulfillment of an obligation; and (f) conveyances of *chattels real*, as the creation or transfer of a term of years.

(a) *Conveyances Derived from the Statute of Uses.*

Nature and effect.—As has been shown,¹ it was at one time a common practice, in England, for a person seized of lands to bargain and sell the same to another, usually by a

¹ See *ante*, p. 53.

secret conveyance, and in such case, if the consideration was sufficient to raise a use, the bargainor became seized to the use of the bargainee. To avert the evil consequences resulting from such acts, the statute of uses had the effect of immediately transferring the legal estate and possession to the bargainee, or, as it is technically termed, executing the use, by uniting the legal possession to the beneficial use and thus making but one estate.¹ The effect of this statute was to give rise to several new species of conveyances operating quite contrary to the rules of the common law. Actual livery of seizin, an indispensable requisite at common law, was wholly dispensed with, the statute transferring possession by operation of law, and the possession thus transferred was not a mere possession in law, but an actual seizin or legal estate.

Three different forms were evolved under this statute by the conveyancers, the principal of which was called a *bargain and sale*. As a use could not be raised without a consideration, and as a bargain and sale was merely the conveyance of a use, it became necessary, in every instance, that the conveyance should be supported by a valuable or pecuniary consideration, and it is from this circumstance that the mention of consideration owes whatever importance it has in modern deeds.

It is said that when the statute of uses was enacted it was foreseen that all lands would thenceforth be conveyed by bargain and sale, being a conveyance of a private or secret nature. To avoid such secret conveyances a supplementary act provided that thenceforth all such deeds should be in *writing* and *enrolled* in one of the courts at Westminster or within the county where the lands were situate, such latter provision being the germ of the American registration laws.

The other forms arising under the statute have never received such recognition in this country as to render a further mention necessary, but from a very early period the deed

¹ Cruise, Dig., tit. 32, ch. 9; 2 Black. Com. 268; 4 Kent, Com. 490; Wms. Real Prop. 155.

of bargain and sale has been employed as an operative instrument of conveyance, and at present has almost entirely superseded the common-law deeds. Indeed, even when common-law deeds are ostensibly employed, they are usually but adaptations of common-law forms to the methods of a bargain and sale.¹ There is now no practical distinction between the two species.

Warranty deeds.—The most familiar form of conveyance known to our law is the deed of bargain and sale, technically called a *warranty deed*. The legal import of a deed of this character is simply that there is no resulting trust in the grantor, who is estopped from ever after denying its execution for the uses and purposes mentioned in it,² while its name is derived from the personal covenants which follow the *habendum*. The operative words of conveyance in this class of deeds are “grant, bargain and sell,” which in many states are express covenants of seizin, freedom from incumbrances, and quiet enjoyment,³ unless their statutory effect is rendered nugatory or limited by express words contained in such deed.⁴ It is still a common practice for the conveyancer to insert in warranty deeds, as well as in other classes of conveyances, all the operative terms used in transferring land; but their presence, save where they imply covenants, is no longer necessary. It must be understood that some words evidencing an intention must appear, but the conveyancer has a choice of a number, and the word “convey,” which is most in use, fully expresses the intent, and is effectual for all purposes.⁵

¹ Thus, it is not uncommon to meet with forms borrowed from the ancient charter of feoffment, modified by a declaration of the uses to which the estate is to be held, and the deed operates as a bargain and sale.

² Kimball v. Walker, 30 Ill. 482.

³ This matter is statutory.

⁴ Prettyman v. Wilkey, 19 Ill. 235; Finley v. Steele, 23 Ill. 56; Brodie v. Watkins, 31 Ark. 319.

⁵ An extremely simple form of a deed in fee is given in 4 Kent, Com. 461. And see Hutchins v. Carleton, 19 N. H. 487; Bridge v. Wellington, 1 Mass. 219.

Quitclaim deeds.—There is in common use in the United States a species of conveyance derived from the deed of bargain and sale under the statute of uses, but bearing a strong resemblance to the old common-law deed of release, called a *quitclaim*. Its import is a conveyance or release of all present interest in the grantor; but, unlike the common-law release, which was only effectual in favor of some person in possession, or who claimed or had some interest in the land, it is equally available as a mode of conveying an independent title, and, for all practical purposes, is regarded as an original conveyance.

A quitclaim deed is as effectual for transferring the title to real estate as a deed of bargain and sale,¹ and passes to the grantee all the present interest or estate of the grantor,² together with the covenants running with the land, unless there be special words limiting and restricting the conveyance.³ But while a quitclaim deed is as effectual to pass title as a deed of bargain and sale, still, like all other contracts, it must be expounded and enforced according to the intention of the parties as gathered from the instrument; and if the words used indicate a clear intention to pass only such land or interest as the grantor then owns, lands embraced in a prior valid deed have been held to be reserved from its operation, even though such prior deed remains unrecorded.⁴ It is a rule, however, of general application, that a quitclaim deed, when recorded, takes precedence of a prior unrecorded warranty deed from the same grantor, the purchaser under the quitclaim having no notice of the prior deed, and there being no words therein suggestive of an earlier conveyance.⁵

A quitclaim deed, though effectual as a present conveyance, when unaccompanied by warranty will not operate to

¹ Morgan v. Clayton, 61 Ill. 35; ³ Brady v. Spruck, 27 Ill. 478;
Rowe v. Pecker, 30 Ind. 154; Pin- Marden v. Chase, 32 Me. 329.
gree v. Watkins, 15 Vt. 479.

² Nicholson v. Caress, 45 Ind. 479; ⁴ Hamilton v. Doolittle, 37 Ill. 473.
Carter v. Wise, 39 Tex. 273; Car- ⁵ Brown v. Coal Oil Co., 97 Ill.
pentier v. Williamson, 25 Cal. 158. 214; Graff v. Middleton, 43 Cal. 341;
Marshall v. Roberts, 18 Minn. 405.

carry a subsequently acquired title,¹ nor can one who takes under such a deed be regarded as a *bona fide* purchaser without notice of outstanding titles and equities.² He obtains just such a title as the vendor had, and the land in his hands remains subject to all the equities attaching to it in the hands of the vendor, though they may be unknown to such purchaser.³ But it would seem this harsh doctrine is not applicable in all cases. It prevails in settling conflicting titles, and is intended to protect equities as against those charged with notice of their existence, but is never invoked to protect a fraudulent grantor who, by false representations, induces a confiding purchaser to believe that he acquires a clear title under a quitclaim deed.⁴ In the absence of fraud, however, a party accepting a quitclaim deed takes the risk of the title;⁵ for where a person purchases of another who is willing to give only a quitclaim, he may properly enough be regarded as bound to inquire and ascertain at his peril what outstanding equities exist, if any. His grantor virtually declares to him that he will not warrant the title even as against himself, and it may be presumed that the purchase price is fixed accordingly.⁶ A different rule prevails as to the grantee of one holding under a quitclaim, when such grantee holds by a warranty deed, and in such case such subsequent grantee is presumed to be a *bona fide* purchaser for value. He is not affected by the mere fact that he takes through a quitclaim deed, and will take the title free from outstanding equities of which he had no notice. It is the policy of the law that real estate titles should become matters of certainty as far as possible; and as quitclaim deeds occur in

¹ Comstock v. Smith, 13 Pick. 116; Jackson v. Winslow, 9 Cow. 13; Harriman v. Gray, 49 Me. 538; Kinsman v. Loomis, 11 Ohio, 475; Miller v. Ewing, 6 Cush. 34.

² Stoffel v. Schroeder, 62 Mo. 147; Carter v. Wise, 39 Tex. 273; Springer v. Brattle, 46 Iowa, 688; Oliver v. Piatt, 3 How. (U. S.) 363.

³ Mann v. Best, 62 Mo. 491; May v. Le Claire, 11 Wall. (U. S.) 217.

⁴ Ballou v. Lucas, 14 Reporter, 265.

⁵ Botsford v. Wilson, 75 Ill. 132; Thorp v. Coal Co., 48 N. Y. 253.

⁶ Winkler v. Miller, 54 Iowa, 476.

the lives of many titles, a different rule than the one above set forth would tend to unsettle titles, hinder and delay improvements and impair the selling value of all such property.

The operative granting words of deeds of this nature are "remise, release, convey and quitclaim;" but any other words indicating conveyance will do as well and have the same effect. Should the deed contain the statutory words which raise covenants, then the instrument in effect becomes a warranty deed, though in form a quitclaim.¹ To raise a statutory covenant the very words of the statute must be used,² and if only a part of them appear, as "grant, sell and convey," the deed will remain a quitclaim.³ It is the custom of conveyancers to insert after the words of grant a recital of the estate or interest conveyed, as, all "right, title, interest," etc.; but this is the legal as well as the statutory effect of the deed, and their omission or insertion is immaterial. Where the deed contains covenants of any kind, particularly of warranty, these words become material, however, and in some states they are of controlling efficacy,⁴ as per the succeeding paragraph.

Effect of covenants in quitclaim deeds.—Inasmuch as the particular granting words employed in deeds are now of comparatively little moment, if one conveys land with a general covenant of warranty against all lawful claims and demands, he cannot be allowed to set up against his grantee, or those claiming under him, any title subsequently acquired, either by purchase or otherwise, and such new title will inure by way of estoppel to the use and benefit of his grantee, his heirs and assigns.⁵ But where the deed does not on its face purport to convey an indefeasible estate, but only "the right, title and interest" of the grantor, though

¹ De Wolf v. Hayden, 34 Ill. 525. 323; Frink v. Darst, 14 Ill. 304;

² Vipond v. Hurlbut, 22 Ill. 226. Young v. Clippinger, 14 Kan. 148.

³ Whitehall v. Gottwal, 3 Pa. ⁴ See Holbrook v. Debo, 99 Ill. 382.

⁵ Comstock v. Smith, 13 Pick. 119.

containing covenants of ownership, warranty, etc., it will, it seems, only convey such interest in the land as the grantor has at the date of the deed,¹ and the covenants are to be regarded as having reference to and as being qualified and limited by the grant.² In a like case, where the grantor agrees to warrant the title conveyed, only as against all claims derived from himself, he is understood to refer to existing claims and incumbrances, and not to any title he might afterward derive from a stranger.³ A distinction has been made by the courts between such deeds as quitclaim or release the land itself and such as merely release whatever interest the grantor may have in the land,⁴ though the distinction does not always seem to rest in sound reason.

Special warranties.—There is in common use in the United States, though it would seem to be rarely employed in England, a deed of conveyance, with a limited warranty, variously known as a “special warranty” or deed of “non-claim.” In its original form the non-claim was inserted immediately after the *habendum*, without the usual words of covenant being prefixed, and purported to be a denial of any further rights in the grantor in relation to the property conveyed, and from which he was “utterly debarred and forever excluded” by virtue of the instrument.⁵ The covenant might be general, but was usually limited to the grantor and those claiming under him. As now framed it is a limited personal covenant, not as against paramount title, but only so far as concerns the acts of the grantor. It is a covenant of warranty to the extent of its import, and differs from a general warranty only, in that one is warranty against any and all paramount titles, while the other is against the

¹ *Brown v. Jackson*, 3 Wheat. 449; *Bowen v. Thrall*, 28 Vt. 382; *Blanchard v. Brooks*, 12 Pick. (Mass.) 47. *v. Moore*, 14 Cal. 474; *Allen v. Holton*, 20 Pick. 458; *Holbrook v. Debo*, 99 Ill. 372.

² *Bell v. Twilight*, 6 Foster (N. H.), 411; *Rawle, Cov. for Tit.* 420.

³ *Bogy v. Shoab*, 13 Mo. 378; *Gee*

⁴ See *Holbrook v. Debo*, 99 Ill. 372; *Blanchard v. Brooks*, 12 Pick. 46.

⁵ See *Rawle on Cov. for Title*, p. 223 (3d ed.).

grantor himself, and all persons claiming by, through or under him.¹

Statutory forms.— While the tendency of courts and conveyancers has been to modify and reduce the common-law forms of expression in conveyances of land, the radical hand of the legislator has been felt of late years in the sweeping changes made in many of the states in regard to the form, contents and effect of deeds and kindred instruments. Statutory forms are prescribed, as short and curt as those they are intended to supplant were often long and verbose. The wisdom of these forms has often been doubted, while their poverty of language has not endeared them to the conveyancer; and as the statute has left their use optional, they have not as yet, in many localities, come into very general use. The operative words of statutory deeds purporting to convey the fee are “convey and warrant,” which words have also the effect of express covenants of seizin, good right to convey, freedom from incumbrances, peaceable possession and warranty of title. Deeds made in conformity to statute have all the force and effect of covenants that are usually contained in the common-law deeds. All the covenants mentioned in the statute are to be regarded and treated as though they were incorporated in the deed, of which they constitute a part as effectually as if they were written therein.² The operative words of conveyances of naked interests are “convey and quitclaim.”

In a few states the desire to “simplify” has cut the verbiage down to the fewest words possible to effect a conveyance. The operative word of conveyance in these deeds is “grant,” which is held to have effect as a covenant against the grantor’s own acts.

¹ Holbrook v. Debo, 99 Ill. 372; ² Carver v. Louthain, 38 Ind. 530;
Porter v. Sullivan, 7 Gray, 441; Kent v. Cantrall, 44 Ind. 452.
Lathrop v. Snell, 11 Cush. 453.

(b) *Conveyances Derived from the Common Law.*

Generally considered.— In addition to the deed of bargain and sale, which, in its various modifications, has been made a statutory conveyance in a majority of the states, there are also in general use a number of technical conveyances derived from the old forms of common-law deeds. But aside from their names they possess but few of the attributes formerly ascribed to them. Much of their original significance has been lost under our comparatively simple land system, and there now exist but few estates that cannot be adequately conveyed by deed of bargain and sale. Indeed, in a majority of instances a “quitclaim” deed will accomplish all that was formerly sought through the media of the verbose and highly technical deeds of the common law.

Common-law conveyances were divided into *primary* or *original* deeds, being where an estate was originally created, and *secondary* or *derivative* deeds, being where an estate already created was enlarged, restrained, transferred or extinguished.

The principal form was called a *feoffment*, which originally signified the gift of a feud, but by custom it came afterwards to signify a gift of a free inheritance, or *liberum tenementum*, to a man and his heirs, respect being had rather to the perpetuity of the estate granted than to the tenure.¹ This form was employed in England for ages prior to the enactment of the statute of uses, and was in active service until a comparatively recent period. Until the time of Charles II. it was not required to be in writing, and even after it became customary to make written deeds it was still necessary to its validity that it be accompanied by livery of seizin; that is, an actual delivery of possession was required. This was done by the feoffee coming upon the land and taking the key of the door, a twig, or a piece of turf, and handing it to the feoffee, or by simply stating to the feoffee that he might enjoy the land according to the deed.

¹ Cruise, Dig., tit. 32, ch. IV; 4 Kent, Com. 489.

This was called livery *in deed*, and was distinguished from livery *in law*, which was where the parties were in sight of the land, but not on it, and the feoffor indicated to the feoffee by apt words his intention that the latter should enter and take possession. In these particulars the deed was in marked contrast to the deed of bargain and sale, which dispensed with an actual livery. It is true that such deeds all recognized a seizin¹ as essential to give effect to the conveyance; but the statute transferred this by operation of law. So much of the nature, operation or effect of deeds of feoffment as has been retained in American conveyancing has been merged in the deed of bargain and sale, and the operative words of grant of the ancient conveyance are still frequently used in modern deeds.

The next in importance of the primary common-law deeds was called a *lease*, a name it still retains. Of the secondary conveyances, the deeds of *release*, *confirmation*, *surrender* and *assignment* still exist in modified forms in all or a majority of the states.

Release.—The term *release*, in its popular and limited signification, is now used to denote the instrument whereby the interest conveyed by a mortgage is reconveyed to the owner of the fee, and it is also used generally to designate the conveyance of a right to a person in possession. In England it obtains in a fourfold form, and is one of the most important of the common-law forms of conveyance.² In the United States, the technical principles relating to deeds of this character are wholly, or in a great measure,

¹ Seizin, in the common law, may be defined as the possession of land under a claim, either express or implied by law, of an estate amounting at least to a freehold. See *Towle v. Ayer*, 8 N. H. 58.

² Under the English rules of conveyancing, in order to give effect to a deed of release it is first nec-

essary to execute a lease (or bargain and sale for a year), which by force of the statute of uses puts the lessee or bargainee in possession, and being thus in possession, although by a mere fiction, the release, operating by way of enlargement of the estate, is effectual to transfer the entire title.

inapplicable, while the conveyance which corresponds to a release at common law is the popular quitclaim deed, the operative words of conveyance being the same in both deeds. If a release is used it is regarded as a substantive mode of conveyance.¹

Where a deed remising and releasing premises contains a covenant of warranty of title, either general, or simply as against the claims of all persons claiming under the grantor only, and particularly if the *habendum* be to the grantee, his heirs, etc., it will not be a simple release, but a conveyance of the fee; and a title subsequently acquired by the grantor will inure to the grantee, unless it is derived from sale under an incumbrance assumed by the grantee.²

Confirmation.—The subject of *confirmation* has been several times alluded to in the course of this work, but mainly in treating of confirmations by the government of previously existing but inchoate rights to what would otherwise be public land.³ Deeds of confirmation are also in use among individuals, and is that species of conveyance whereby an existing right or voidable estate is made sure and unavoidable, or where a particular interest is increased. The appropriate technical words of confirmation are “ratify, approve and confirm,” but “grant and convey” or similar terms will have the same effect.

Deeds of confirmation are not in general use, as a “quitclaim” is effective for almost every purpose which might be accomplished by the former. Frequently, however, recitals in deeds show them to be given in ratification or confirmation of previous acts, and to correct errors, irregularities or infirmities in former deeds, in which event they take effect by relation as of the date of the former act or deed, and the confirmatory words become material to interpret and explain the undisclosed intention or correct the irregularity of the former deed.

¹ Hall's Lessee v. Ashby, 9 Ohio, 96.

² People ex rel. Weber v. Herbel, 96 Ill. 384.

³ See p. 88, *supra*.

Surrender.—A *surrender* is defined as the yielding up of an estate for life or years to him who has an immediate estate in reversion or remainder, the lesser estate being merged in the greater by mutual agreement,¹ and the term is applied both to the act and the instrument by which it is accomplished. It is directly opposite in its nature to release, which technically operates by the greater estate descending upon the lesser. The operative words of a conveyance of this nature are “surrender and yield up,” but any form of words that indicates the intention of the parties will serve the same purpose, while a surrender is always implied when an estate incompatible with the existing estate is accepted.

Though books on conveyancing still continue to give ample forms for deeds of surrender, the quitclaim deed in common use has taken its place for most purposes; but it would seem that this is still the proper instrument for the relinquishment of leasehold interests, dower, etc. In deeds of surrender the special matter of inducement usually precedes the operative part of the deed; as, in case of leasehold, a recital of the lease, etc.

Assignment.—An *assignment* is a mode of conveyance applicable to any estate in lands whatever; but the term is usually employed to express the transfer of an equitable estate, an estate for life or years, or a leasehold interest, and as such will receive attention in other parts of the work. The operative words of conveyance are “assign, transfer and set over,” but any other words evincing an intention to make an entire transfer are sufficient.²

An assignment by indorsement on a deed is entirely nugatory. Such a proceeding might, perhaps, vest in the assignee a right to the paper itself, but would not affect the title to the land. At best, it might, in equity, be considered as an executory contract, on proof of the facts connected with it, and as such entitle the assignee to a decree for specific per-

¹ 2 Bouv. Law Dict. 573; Coke, Litt. 337b.

² Cruise, Dig., tit. 32, ch. V; 2 Hill, Abridg. 318; 2 Black. Com. 336.

formance, but it would not operate as a conveyance of the legal title.¹

In its popular acceptation, in the United States, the term is used to distinguish a peculiar class of conveyances, usually resorted to by persons who find themselves in embarrassed circumstances or who are unable to satisfy the full demands of their creditors. In this sense they are classed as *voluntary*, or such as are made by the free act and deed of the assignor; and *involuntary* or statutory, or such as are made under compulsion of law and in furtherance of statutes of bankruptcy or insolvency. In all cases they imply a trust and the intervention of a trustee,² and conveyances made directly to the beneficiaries, though for the same purpose, are not technically assignments,³ and come under the provisions regulating ordinary deeds of transfer and sale.

In effect an assignment is an absolute conveyance by which both the legal and equitable estate becomes divested out of the grantor, and vested in the assignee, subject to the uses and trusts in favor of the creditors.⁴

Continued—Voluntary assignments.—The power to make an assignment for the benefit of creditors is not derived from any statutory enactment. Every debtor, whether solvent or insolvent, possesses, independent of statutory grant, the right to make any disposition of his property which does not interfere with the rights of others; in other words, to make any honest disposition of his property that he pleases. The right of assignment is clearly within the absolute dominion which the law empowers every man to exercise over his own. Statutory provisions concerning assignments are to be found in all the states, yet such statutes do not confer the right, but

¹ Lessee of Bentley v. De Forrest, 24 Ind. 395; Johnson v. McGraw, 11 Iowa, 151; Griffin v. Roger, 38 Pa. St. 382.

² Cowles v. Rickett, 1 Iowa, 332; Dickson v. Rawson, 5 Ohio St. 218; Peck v. Merrill, 26 Vt. 686.

³ Beach v. Beston, 47 Ill. 521; N. Y. 574.

⁴ Dwight v. Overton, 32 Tex. 390; Van Keuren v. McLaughlin, 21 N. J. Eq. 163; Driggs v. Davis, 21

merely regulate its exercise, subjecting it, as in other transfers of property, to certain restrictions and limitations which experience has demonstrated to be wise and just; but it is still the assignor's voluntary act, and not the act of the law. So, also, the power of the assignee is fixed by the instrument of assignment, which is at once the guide and measure of his duty. Beyond that, or outside of its terms, he is powerless and without authority. He distributes the proceeds and disposes of the estate placed in his care according to the dictation and under the sole guidance of the assignment, and the statutory provisions merely regulate and guard his exercise of an authority derived from the will of the assignor. In all things the assignee is the representative of the assignor, and must be governed by the express terms of his trust.¹

Continued — Formal requisites.—Though voluntary assignments are founded on common right, yet, to prevent fraud by the setting up of fictitious transfers claimed to have been made for the benefit of creditors, they must be attended with the prescribed legal formalities of the state where made, or where the property to be affected is situated; and unless executed in conformity with such laws are inoperative and void. By the instrument the debtor's property must be unconditionally and without restriction transferred to the assignee, with a general authority to him to receive, hold and dispose of it for the equal benefit of all the creditors, or in the order of preference, if any, provided for.²

The assignment should be executed with the same solemnities that characterize ordinary deeds for the conveyance of land, and be duly acknowledged before an authorized officer.³

No particular form of instrument is needed to constitute an assignment, and any valid transfer, intelligibly indicating

¹In re Lewis, 81 N. Y. 421; Pillsbury v. Kingon, 31 N. J. Eq. 619; Bank v. Willis, 7 W. Va. 31.

²McIntire v. Benson, 20 Ill. 500.

³Britton v. Lorentz, 45 N. Y. 51.

the trusts, will suffice.¹ It is usual to set out the real estate conveyed, either in the body of the assignment or a schedule thereto annexed, yet such is its force as a conveyance, that, when made in general terms, it passes all the property which the assignor then owns, either in possession or expectancy, and the omission to mention it in the inventory will not prevent the title from passing to the assignee.² If the instrument mentions specific property, without a clause of general conveyance, or even makes special exceptions, it will not, for that reason, be void, as the title to such withheld property may still be pursued by creditors, their remedies being neither hindered nor delayed;³ and so long as there is no reservation of some part of, or some right or interest in, the property actually conveyed, the assignment will be valid. The statutory requirements relate mainly to the acceptance of the trust by the assignee, filing of bond, etc.

(c) *Conveyances by Delegated Authority.*

General principles — Powers.—A conveyance may be the direct act of the grantor, or it may result through some delegation of authority; in this latter event the person who executes the deed, or intermediary, is said to act under a *power*.

Powers are classed as *inherent* and *derivative*, the former being enjoyed by their possessors as of natural right, while the latter are such as are received from another. It is with the latter class only we now have to treat.

The person granting a power is called the *donor*; the person receiving it the *donee*; and while these terms are constantly employed in speaking of powers under the statute of uses, yet with respect to powers which are intended only as delegations of authority, and which practically create the relation of *principal* and *agent*, these latter terms are more generally used.

A very common example of a power is that presented by

¹ Norton v. Kearney, 10 Wis. 443. 258; Ingraham v. Grigg, 21 Miss.

² Roseboom v. Mosher, 2 Denio 22; Bates v. Ableman, 13 Wis. 664; (N. Y.), 61. Carpenter v. Underwood, 19 N. Y.

³ Knight v. Waterman, 36 Pa. St. 520.

the delivery of a letter or warrant of attorney, and the power thus conferred is what is usually styled a *naked* power. This consists of a simple right or authority disconnected from any interest of the donee or agent in the subject-matter. But the power may consist of a right or authority to do some act, together with an interest in the subject on which the power is to be exercised; in which case it is said to be *coupled with an interest*. This occurs whenever the power or authority is connected with an interest in the thing itself actually vested in the agent; it must not, however, be merely an interest in that which is produced by the exercise of the power, but the power and the estate must be united or be co-existent.¹

Powers which derive their operation through the statute of uses are authorizations which enable a person through the medium of the statute to dispose of an interest in real property, vested either in himself or another. They formerly constituted a very elaborate and intricate system in connection with uses and trusts, but modern legislation has greatly circumscribed their scope and confined their operation to a comparatively narrow channel. They are said to be *appendant* where the donee is authorized to exercise out of the estate limited to him the privilege of making grants; and *in gross* where the donee, who has an estate in the land, is given authority to create such estates only as will not attach on the interest limited to him or take effect out of his own interest. Powers of *appointment* are those which go to create new estates, and are distinguished from powers of *revocation*, which are to divest or abridge an existing estate. Such powers are also divided into *general*, being those by which the donee is at liberty to appoint whomsoever he pleases, and *special*, or those in which the donee is restricted to an appointment to or among particular persons only. These powers may be created by deed, but are more generally raised by wills and testamentary writings.²

¹ Walker v. Denison, 86 Ill. 142; Kent, Com. 334; Wms. Real Prop. Gilbert v. Holmes, 64 Ill. 548. 245; 2 Wash. Real Prop. 634.

² Consult Cornish, Uses, 89; 4

Powers of attorney.—Any instrument authorizing a person to act as the agent or attorney of the person granting same is technically called a *power of attorney*, and under authorizations of this kind many sales and conveyances of real property are accomplished. They are *general*, as when the agent is authorized to perform all necessary acts on behalf of the principal without limitation as to persons or things, or *special*, as when the power is limited to a particular act or series of acts, or for conveyance to particular persons. Where the power is to sell and convey land, it must be in writing, and should possess the same requisites and formalities that appertain to a valid deed of conveyance.¹

The instrument should recite the scope of the attorney's powers, but where it is deficient in some particular, others, which are necessary to the proper exercise of those expressly enumerated, will be implied as incidental thereto; as, where a power is expressly given to sell or lease the property of the principal, a power to contract to sell, as well as to convey and transfer, will be implied.²

The right of revocation is, as a rule, always reserved, but this is a right incident to the power given, and a principal may always revoke the authority of his agent at his mere pleasure without a reservation of such express right, or even though the power may be expressly declared to be irrevocable.³ The only exceptions to this rule are when the authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is a part of a security, in all of which cases it is irrevocable, whether so expressed or not.⁴

Powers of attorney must be strictly construed; yet the rule does not require a construction that will defeat the mani-

¹ Fire Ins. Co. v. Doll, 35 Md. 89; ³ Walker v. Denison, 86 Ill. 142; Watson v. Sherman, 84 Ill. 263; Brown v. Pforr, 38 Cal. 550.

Clark v. Graham, 6 Wheat. (U. S.) ⁴ Walker v. Denison, 86 Ill. 142; 577; Videau v. Griffin, 21 Cal. 389. Gilbert v. Holmes, 64 Ill. 548;

² Hemstreet v. Burdick, 90 Ill. Brown v. Pforr, 38 Cal. 550.
444.

fest intention of the parties, and where such intention fairly appears from the language used, it must prevail;¹ but the authority cannot be extended beyond that which is clearly given in terms, or which is necessary and proper for carrying the authority given into full execution.² In this respect there is a marked difference as compared with powers of appointment created by deeds and wills, and powers introduced in connection with uses. In this latter class courts of equity have generally indulged in very liberal interpretations of words, and held many executions of such powers valid which would scarcely be allowed in the construction of words employed in the ordinary powers of attorney to sell land.

Revocations.—The recall of a power or authority conferred, or the vacating of an instrument previously made, is called a revocation.³ A power of attorney may be revoked in a variety of ways; as by the death of the principal, which operates as a revocation of every power uncoupled with an interest;⁴ the marriage of the principal, the power having been given while he was a single man;⁵ a conveyance by the principal of the subject-matter of the power before the agent has had an opportunity to dispose of it.⁶ But the giving of a second power to another agent, without specially revoking the first, would not act as a revocation, and if either power is executed both will be exhausted.⁷ In the foregoing instances the revocation occurs by operation of law. The principal may revoke by a special instrument of revocation,

¹ Hemstreet v. Burdick, 90 Ill. 444.

² Pool v. Potter, 63 Ill. 533. Thus, a power of attorney jointly executed by husband and wife for the sale of all of their property, and in which the words "we," "ours," etc., are exclusively used, has been held insufficient to authorize a sale of the individual property of either,

or at least in the absence of proof of the non-existence of joint property. Dodge v. Hopkins, 14 Wis. 630.

³ 2 Bouv. Law Dict. 477.

⁴ Blayton v. Merrett, 52 Miss. 353; Davis v. Savings Bank, 46 Vt. 728.

⁵ Henderson v. Ford, 46 Tex. 327.

⁶ Walker v. Denison, 86 Ill. 142.

⁷ Cushman v. Glover, 11 Ill. 600.

which, when recorded with the power, will operate as constructive notice of such fact.

It is important, in sales of real property, that sufficient evidence should always be provided as to the continuance of the power at the time of its exercise.

Substitution.—It is a cardinal rule that a delegated power cannot be delegated, but in its application to powers of attorney it is somewhat restricted; as, when the instrument contains a special power of substitution, the power conferred may be, and often is, delegated to another.¹

Execution of power by attorney.—Every deed executed by virtue and in pursuance of a power should bear upon its face a recital of authority; but deeds purporting to be the direct act of the grantor, though performed by an attorney in fact, are sufficiently formal if the execution and authentication affirmatively show the fact. The instrument is properly and legally executed if it bears the name (signature) and seal of the grantor, showing the procurement of the attorney, and purporting to be the act of the principal; but in making the acknowledgment, the attorney, being the person who executes the instrument, must acknowledge it; yet this he does as and for his principal.

As to what constitutes a proper signing there is some conflict of authority, the earlier cases holding it to be immaterial whether the attorney sign "A., attorney for B.," or "B., by his attorney, A.,"² on the theory that no particular form of words is necessary to bind the principal, provided the agency of the attorney appears from the deed itself.³ It is now well established, however, that a conveyance made by an attorney must be in the name of the principal, and purport to be executed by him;⁴ and where the agent assumes

¹ Story, Ag., § 13.

³ Magill v. Hinsdale, 6 Conn. 464;

² Jones v. Carter, 4 Hen. & M. 184; Montgomery v. Dorion, 7 N. H. 475. Wilkes v. Back, 2 East, 142.

Worrall v. Munn, 1 Seld. 229.

⁴ Pensonneau v. Bleakley, 14 Ill. 15; Elwell v. Shaw, 16 Mass. 42; Thurman v. Cameron, 24 Wend.

either to grant or to execute, as where he signs and seals, although describing his office, the deed will be void as to the principal.¹ It has also been held that signing the principal's name, but making no mention of the attorney, is not a valid execution.² It would seem, therefore, that in all conveyances by attorneys in fact, both the name of the principal and of the attorney must substantially appear in the execution of the deed, showing not only that the grant and seal are those of the principal, but by whom these acts are done;³ and where there are two grantors, and one of them acts as the attorney in fact of the other, he must subscribe his name twice, once as attorney in fact for the other and once for himself. One signature and a second seal is not equal to a second subscription.⁴

It is not necessary, however, that any particular form of words be used to render the instrument valid and binding upon the principal, provided it shows upon its face that it was intended to be executed as the deed of the principal, and that the seal affixed is his seal and not that of the attorney; and it has been held that where the deed is executed for several parties, it is not necessary to affix a separate and distinct seal for each, if it appears that the seal affixed was intended to be adopted as the seal of each of the parties.⁵

(N. Y.) 90; *Stinchfield v. Little*, 1 Me. 231; *Hale v. Woods*, 10 N. H. 470. Less strictness is required where the instrument is not under seal, it being sufficient, in such case, if the intent to bind the principal appears in any part of the instrument. *Townsend v. Hubbard*, 4 Hill (N. Y.), 351.

¹ *Fowler v. Shearer*, 7 Mass. 14; *State v. Jennings*, 10 Ark. 428; *McDonald v. Bear River Co.*, 13 Cal. 235. And this, even though in the body of the instrument it is stated that it is the agreement of the prin-

cipal by his attorney, and that the principal covenants, etc., while in the testimonium clause it is alleged that A. B. (the agent), as the attorney of the principal, has set his hand and seal. *Townsend v. Corning*, 23 Wend. 435.

² *Wood v. Goodridge*, 6 Cush. 117.

³ See 3 Wash. Real Prop. *573, and cases cited.

⁴ *Meagher v. Thompson*, 49 Cal. 189.

⁵ *Townsend v. Hubbard*, 4 Hill (N. Y.), 351.

Powers of appointment.— There is a further class of powers which do not come within the popular meaning of the term as used with reference to acts done by one as the agent or attorney of another. This class derives its origin and distinctive character from the application of the doctrines of the statute of uses, and is employed where lands are conveyed with an inferior estate to the donee and a right or power of disposal in such donee of the residue or fee. The right to make this disposal, or to designate the person to take the fee, is called a *power of appointment*, and the person taking under it is called the *appointee*.¹ Originally this matter was characterized by much subtlety and refinement; but as the doctrine of uses, out of which it grew, has been very generally abolished or denied in the United States, the creation and execution of powers of this nature have become comparatively simple and easily understood. Powers of appointment may be created by deed, but are usually found in wills. No specific formula is necessary to their creation, and any words which indicate intention to reserve or give the power will ordinarily be allowed to have effect.

It sometimes becomes important to distinguish between the terms which create a power and those which would confer an interest in one; the difference being, so far as the party who ultimately derives title to the estate is concerned, that in the latter case he takes immediately from the donee of the power and interest, while in the former he would take from the grantor himself, the donee being only the medium through which the estate is transferred. The subject will be further examined and illustrated in the chapter on testamentary conveyances.

(d) *Conveyances in Trust.*

Nature and effect — Definition.— As previously stated,² that which in the law of real property now goes by the name of a *trust* was originally called a *use*, and has been de-

¹ See Coke, Litt. 271b; Tud. Lead. Cas. 264; 4 Kent, Com. 334; 2 Wash. Real Prop. 637.

² See *ante*, p. 52.

financed as a confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land and to the person touching the land, for which the beneficiary has no remedy save in chancery.¹ By a later definition it is described as a right of property held by one party for the benefit of another,² and consists of an equitable right, title or interest in the property distinct from its legal ownership.

The device originally grew out of the narrow policy of the common law, which prevented the free exercise of the power of alienation, and was used to convey the beneficial interest in property to persons who were incapable of holding the legal title, or in whom it was not desirable to have the legal title vest. With the gradual disuse of uses and trusts in some states, and their summary abolition in others, conveyances of this character have become infrequent, while in cases of passive trusts no estate or interest, legal or equitable, will vest in the trustee under the statutes of most of the states, but the beneficiary takes the entire legal estate of the same quality and duration, and subject to the same conditions, as his beneficial interest.³

If the instrument imposes on the trustee active duties with respect to the trust estate, such as to sell and convert into money, or to lease the same and collect the rents, pay taxes, etc., and to pay the net proceeds to the beneficiary, it creates an active trust which the statute does not execute; but if there is simply a conveyance to the trustee for the use of, or upon a trust for, another, and nothing more is said, the statute immediately transfers the legal estate to the use, and no trust is created, although express words of trust are used.

Creation of trust.—No particular form of words is requisite to create a trust, the intent only being regarded by courts of equity;⁴ yet the *habendum* usually makes a formal

¹ 1 Lewin on Trusts, 13.

² Bouv. Law Dict., tit. Trusts.

³ Consult local statutes; this is the general statutory rule.

⁴ Fisher v. Field, 10 Johns. 494.

recital after the preliminary words "to have and to hold," etc., by continuing, "in trust nevertheless," or some similar expression. It is essential, however, that the nature and terms of the trust be explicitly declared, as well as the party for whose benefit it is raised, its extent, and the property covered or affected by it.¹ Certainty of expression in each of these details seems to be of prime importance; and if the language in respect to either is so vague, general or equivocal that any of the necessary elements of the trust is left in doubt it will fail.²

Where a trust is intended by a conveyance, but fails entirely, so that the grantee takes no estate in the land under the conveyance, it may nevertheless create in him a valid power in trust,³ the legal title remaining in the grantor.⁴

Where the deed creates a valid trust, the entire estate vests in the trustee, subject only to the execution of the trust, except as otherwise provided; and where the deed gives a power of sale to the trustee at the request and for the benefit of the beneficiary under the deed, no power of revocation being reserved, no estate in the premises is left in the grantor which is capable of being transferred.⁵ Where the legal title is vested in a trustee, nothing short of reconveyance can place the same back in the grantor or his heirs, but under certain circumstances such reconveyance will be presumed without direct proof of the fact.⁶ Trust estates are subject to the same rules as legal estates in every case, dower excepted.⁷

Continued — Declaration of trust.— To establish a trust the evidence must all be in writing, and sufficient to show

¹ Cook v. Barr, 44 N. Y. 156; Jacobs v. Miller, 50 Mich. 126; Ruth v. Oberbrunner, 40 Wis. 238.

² Steere v. Steere, 5 Johns. Ch. (N. Y.) 1; Dillaye v. Greenough, 45 N. Y. 438; McClellan v. McClellan, 65 Me. 506.

³ Fellows v. Heermans, 4 Lans. (N. Y.) 230.

⁴ This is now the general statutory doctrine.

⁵ Marvin v. Smith, 46 N. Y. 571; Leonard v. Diamond, 31 Md. 536.

⁶ Kirkland v. Cox, 94 Ill. 400; reversing 81 Ill. 11; 80 Ill. 67.

⁷ Danforth v. Lowry, 3 Haywood (N. C.), 68.

that there is a trust and what it is;¹ and where land has been conveyed by a deed absolute in form but designed simply for a *habendum* in trust, the grantee may make a valid admission of the trust in a separate instrument.² Such instruments are known as *declarations of trust*, and, unless required by statute, need not be by deed; but any writing subscribed by the trustee will be sufficient if it contain the requisite evidence.³ Although it is not essential that the writing by which the trust is manifested and proven should be in any particular form, it is customary for the trustee to declare same in a formal document, reciting the matter of inducement, declaring the nature of the trust estate, and frequently covenanting against his own acts, and for conveyance to the beneficiary. But any untechnical writing, if it clearly expresses intention and sufficiently connects the trustee with the subject-matter of the trust, will answer all the requirements of law.

Resulting trusts.—It is a general rule of equity that if the purchase-money of land is paid by one person, but the deed, through any accident, mistake, fraud, or other circumstances contrary to the real intention of the parties, is taken in the name of another, the trust of the legal estate results

¹ Cook v. Barr, 44 N. Y. 156; Steere v. Steere, 5 Johns. Ch. 355; 1 Green. Cruise, 335. But this does not apply to resulting trusts, which may be established by parol. Faris v. Dunn, 7 Bush (Ky.), 276; McGinity v. McGinity, 63 Pa. St. 38.

² Elliott v. Armstrong, 2 Blackf. 198; McLaurie v. Partlow, 53 Ill. 340; Cook v. Barr, 44 N. Y. 156; Fast v. McPherson, 98 Ill. 496. Or by the pleadings in a chancery suit. Ibid.

³ Cook v. Barr, 44 N. Y. 156. By the English statute of 29 Charles II., chapter 3, section 7, it was enacted "that all declarations or creations

of trust or confidence of any lands, tenements or hereditaments shall be manifested or proven by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect." This statute provided, not for the creation of trusts, but for proving them, and is the basis of American statutes on the same subject. Though a trust of lands cannot be established by parol, yet if the trustee execute the trust he is bound by the act. Elliott v. Morris, 1 Harp. Eq. 281.

to him who advanced the money.¹ A *resulting trust*, therefore, may be defined as a trust raised by implication of law and presumed to exist from the supposed intention of the parties. It is never created by agreement, but always results by implication of law from acts independent of agreement,² and there can be no resulting trust where the use is expressly limited to the grantee in a deed.³

In the case of trusts resulting by operation of law, an important exception is made to the rule which provides that a trust in land can only be established by some writing duly signed. This exception is made from the necessities of the case, and a trust of this character is permitted to be established by parol.⁴

Removal or substitution of trustees.—Where a trustee is dead, the trust being still alive and unexecuted, a court of equity will carry it out, if necessary, through its own officers and agents,⁵ and may appoint a new trustee;⁶ and it seems that in some states, even where the trust deed contains a power of appointment, in the event of the death of the trustee without executing the trust, the *cestui que trust* cannot appoint a new trustee, but the exercise of this right devolves exclusively on a court of chancery.⁷ A trustee may

¹Case v. Coddington, 38 Cal. 191; Frederick v. Haas, 5 Nev. 389; Fleming v. McHale, 47 Ill. 282; Dryden v. Hanway, 31 Md. 254; Mallory v. Mallory, 5 Bush (Ky.), 464; Johnson v. Quarles, 46 Mo. 423; Nixon's Appeal, 63 Pa. St. 279; Campbell v. Campbell, 21 Mich. 438.

²Sheldon v. Harding, 44 Ill. 68; Stevenson v. Thompson, 13 Ill. 186.

³Donlin v. Bradley, 119 Ill. 412.

⁴Kane v. O'Connors, 78 Va. 76; Wits v. Horney, 59 Md. 584; McCartney v. Bostwick, 32 N. Y. 59; Pritchard v. Brown, 4 N. H. 397.

⁵Batesville Institute v. Kauff-

man, 18 Wall. 120. It is a rule in equity that a trust shall never fail for want of a trustee. Buchan v. Hart, 31 Tex. 647.

⁶Curtis v. Smith, 60 Barb. 9; Hunter v. Vaughan, 24 Gratt. (Va.) 400.

⁷Guion v. Pickett, 42 Miss. 77. As a general rule a court of chancery has jurisdiction to control the exercise of the power of appointment when vested in an individual, so far, at least, as to prevent an abuse of discretion. Bailey v. Bailey, 2 Del. Ch. 95.

always be removed in the discretion of the court upon proper cause shown.¹

Resignation — Refusal to act.— A trustee cannot divest himself of the obligation to perform the duties of his trust, without an order of the court, or the consent of all the *cestuis que trust*;² and where he refuses to act, equity will compel him to do so, or appoint a suitable person in his place.³

(e) *Conveyances by Way of Pledge.*

Generally considered.— It would seem that the common law early recognized two kinds of landed security known respectively as *vivum vadium* and *mortuum vadium*. The former consisted of a feoffment to the creditor and his heirs until out of the rents and profits of the land the debt had been satisfied. The creditor in such case took actual possession of the estate, and received the rents and applied them to the liquidation of the debt; when it was satisfied or paid the debtor might re-enter. This species of pledge is said to have been called *vivum vadium*, or living pledge, because neither the debt nor estate was lost. It is said, however, that this mode of security was not very general, and in time was superseded by the *mortuum vadium*, or dead pledge, so called because on breach of condition the estate was rendered indefeasible in the pledgee and absolutely lost or dead to the pledgor. In the Norman-French of that day this species of conveyance acquired the name of *mort gage* and this name has ever since been retained.

This latter mode of pledging lands was attended with great inconvenience and much hardship. If the money was not paid on the very day named in the deed, the lands be-

¹ Attorney-General v. Garrison, 101 Mass. 223; Ketchum v. Railroad Co., 2 Woods, 532; Scott v. Rand, 118 Mass. 215.

² Thatcher v. Candee, 4 Abb. App. Dec. (N. Y.) 387.

³ Sargent v. Howe, 21 Ill. 148; Wilson v. Spring, 64 Ill. 14. A successor in trust is frequently appointed in a trust deed in case of the inability or refusal of the trustee to act.

came absolutely forfeited; nor would any subsequent tender of the money avail the debtor. Notwithstanding the obvious injustice of this doctrine, the courts of common law held that all the maxims respecting the breach of a condition were strictly applicable to this kind of conveyance, and refused to allow the smallest degree of liberality in their construction. Upon the execution of such a mortgage the legal estate immediately vested in the grantee, technically called the *mortgagee*, subject to be defeated by the performance of the condition. The time appointed for the payment of the money to secure which the mortgage was given became known as the "law day;"¹ and if tender or payment was not made at that time according to condition, the estate became absolute and indefeasible in the mortgagee.

But in the contemplation of equity, the absolute forfeiture of an estate on breach of the condition was regarded as a flagrant injustice and hardship, although perfectly accordant with the system on which the mortgage itself was founded. Equity, therefore, early interposed to moderate the severity of the common law, and, leaving the forfeiture to its legal consequences, operated on the conscience of the mortgagee — acting *in personam* and not *in rem* — and declared it unreasonable that he should retain for his own benefit what was intended merely as a pledge. To effect the object of its interference the court of chancery then adjudged that a condition of this kind was in the nature of a penalty, against which equity ought to relieve; that all the creditor could in justice and conscience be entitled to was his principal, interest and costs; and established it as a ruling principle, that although the condition was not strictly performed, by which the estate was forfeited at law, yet if the debtor, called the *mortgagor*, paid the money borrowed and interest within a reasonable time, he should be entitled to call upon the mortgagee for a reconveyance of his lands.²

¹ Because after default the legal rights of the mortgagor were extinguished.

² See Cruise, Dig., tit. 15, ch. 1; Story, Eq. Jur., ch. 27; 2 Black. Com., ch. 10.

This right acquired the name of an *equity of redemption*, and from this grew the practice of filing bills in equity by the mortgagee to foreclose and cut off the right of redemption in the mortgagor.

In the United States the subject of mortgages is now very generally regulated by statute.

Modern doctrine of mortgages.—Notwithstanding that a mortgage in form still purports to convey a present legal estate to the mortgagee, liable to be defeated only by the performance of stipulated conditions, yet the modern doctrine is that it is but a lien on land by way of security for a debt, and that the legal title remains in the mortgagor subject only to the lien;¹ that the right a mortgagee has to hold the mortgaged premises as security for his debt is not an estate in the land, and passes only by an assignment of the debt.² The estate remaining in the mortgagor after the “law day”³ has passed, or at any time before foreclosure, is still popularly but erroneously called an “equity of redemption,” retaining the name it had when the legal estate was in the mortgagee, and the right to redeem existed only in equity;⁴ but the words “redemption” and “equity of redemption” are all that survive, the ideas they once represented having long since become obsolete. The same is the case with reference to the word “forfeiture,” so often used in connection with this subject; there is now no forfeiture

¹ Vason v. Ball, 56 Ga. 268; Wing v. Cooper, 37 Vt. 169; Fletcher v. Holms, 32 Ind. 497; Carpenter v. Bowen, 42 Miss. 28; Woods v. Hildebrand, 46 Mo. 284; Astor v. Hoyt, 5 Wend. 602.

² Mack v. Witzler, 39 Cal. 247.

³ This expression, as previously explained, once very distinctly marked the time when all legal rights were lost by the mortgagor's default, but now there is no such time until foreclosure by a judicial sentence or under a power of sale.

⁴ Croft v. Bunster, 9 Wis. 503; Drayton v. Marshall, 1 Rice's Eq. (S. C.) 373; Stewart v. Barrow, 7 Bush (Ky.), 368. It would seem that this doctrine still prevails in a few states, and in a modified form in others; as, after condition broken or default, the legal title is held to pass to the mortgagee. Johnson v. Houston, 47 Mo. 227; Fuller v. Eddy, 49 Vt. 11.

of a mortgaged estate, and until foreclosure the right of the mortgagor is the same the day after default as it was the day before.

The term "mortgage" now has a technical significance in law, and when used in legal proceedings as descriptive of a written instrument must be taken and construed according to its technical legal import. In this respect a right of redemption is an essential ingredient and is always implied, even though no defeasance is expressed in the instrument itself.¹

Different kinds of mortgages.—Conveyances for the security of a debt or the protection of creditors may be divided into three classes. The first includes mortgages properly so called, being conveyances from debtor to creditor, expressed to be by way of a pledge or security for the payment of the indebtedness or for the indemnification of the grantee against a particular loss, and containing a clause of defeasance upon the performance of the stipulated conditions.² To this division also belongs that class of mortgage securities technically known as "trust deeds," wherein the debts are specified and the creditors named or described, but because of their large number, or to allow greater freedom in the transfer of the evidences of the indebtedness, or for other circumstances making a conveyance directly to them less convenient, the deed is made to a mortgagee as a trustee, the creditors standing in the position of *cestui que trust*.³

The second division consists of conveyances which are ab-

¹Walton v. Cody, 1 Wis. 420; Peugh v. Davis, 96 U. S. 332; Wing v. Cooper, 37 Vt. 169; Bearss v. Ford, 108 Ill. 16. "Once a mortgage always a mortgage" is a universal rule in equity, and no agreement in a mortgage to change it into an absolute conveyance upon any condition or event whatever will be allowed to prevail. Clark v. Henry, 2 Cow. 324.

²Vason v. Ball, 56 Ga. 268.

³Hurley v. Estes, 6 Neb. 386; Turner v. Watkins, 31 Ark. 429. A trust deed executed to secure a debt does not vest in the trustee the legal title to the land, which can only be taken away from the grantor by foreclosure or other legal process in substantial accord with the deed. Ingle v. Culbertson, 43 Iowa, 265.

solute in form, but, being intended as security for debt only, courts of equity will give effect to the intention of the parties, whatever be the form of the conveyance, and treat same as a mortgage, except as against the rights of *bona fide* purchasers or other intervening equities.¹ These are known as "equitable mortgages."

The third division contemplates all deeds of trust or assignments for the payment of creditors generally,² the mortgagee in such case representing the rights of the mortgagor only.³

Mortgages may assume a variety of shapes and their identity become almost concealed, but the fact of security is always sufficient to furnish an indication of their true character.⁴

The equity of redemption.—The estate remaining in the mortgagor before foreclosure is popularly but erroneously called an equity of redemption. Although a misnomer, it does not mislead. The legal estate remains in the mortgagor and is subject to dower and curtesy; the lien of judgments; may be sold on execution; and may be the subject of mortgage and sale, the same as any other estate in lands; while the mortgagee has but a lien upon the land as a security for his debt, and the same is not liable to his debts, or subject to any of the incidents of an estate in lands.⁵ The

¹ Sweet v. Mitchell, 15 Wis. 641; French v. Burns, 35 Conn. 359; Shays v. Norton, 48 Ill. 100.

² Bank v. Lanahan, 45 Md. 396.

³ Spackman v. Ott, 65 Pa. St. 131.

⁴ A penal bond to reconvey lands has been held to be a mortgage. Reynolds v. Scott, Brayt. (Vt.) 75. So of a deed with a bond for reconveyance. Wing v. Cooper, 37 Vt. 199. But otherwise upon facts stated. Rich v. Doane, 35 Vt. 125. So, also, of a deed with a stipulation that title shall not vest until

the purchase-money is paid. Pugh v. Holt, 27 Miss. 461. And, generally, any conveyance expressed to be to secure a payment. Cowles v. Marble, 37 Mich. 158; Bearss v. Ford, 108 Ill. 16; Parks v. Hall, 2 Pick. (Mass.) 211.

⁵ Odell v. Montross, 68 N. Y. 499; 2 Wash. Real Prop. 152; Gorham v. Arnold, 22 Mich. 247; White v. Rittenmeyer, 30 Iowa, 268. This is the general doctrine; yet in some states it is still held that, after the expiration of the law day, the mort-

mortgagor retains and is possessed of an estate in the land in virtue of his former and original right, and there is no change of ownership. So far as the entire estate is concerned, there is but one title, and this is shared between the mortgagor and mortgagee, the one being the general owner and the other having a lien which, upon a foreclosure of the right to redeem, may ripen into an absolute title, their respective parts, when united, constituting one title.¹ The possession of the mortgaged premises in no way affects the right of the one to redeem or of the other to foreclose.²

Mortgages proper.—A mortgage may be made by an absolute conveyance with a defeasance back, but this form has never been in general use in the United States, and is now obsolete. The class of conveyances to which this name is technically applied consists of an instrument in form purporting to convey a present estate to the mortgagee, liable to be defeated by the performance of stipulated conditions,³ and is always between the principals to the transaction.

Trust deeds.—Trust deeds in the nature of a mortgage were once in very common use, but the sweeping changes

gagor, or one occupying his position, is considered as tenant at sufferance of the mortgagee, and liable to be evicted without notice to quit. The mortgagee in such case has a right of entry, which he may peaceably assert without notice and without action; or he may, with or without notice to quit, bring ejectment, and may recover possession of the land and damages for use and occupation after notice to quit, and if no notice, then after the service of the writ; and this either against the mortgagor or his assignee. *Mason v. Gray*, 36 Vt. 311; *Collame v. Langdon*, 29 Vt. 32; *Welsh v. Phillips*, 54 Ala. 39.

¹ *Odell v. Montross*, 68 N. Y. 499.

² *Parsons v. Noggle*, 23 Minn. 328.

³ It is the universal custom to witness the obligation of payment by a bond or promissory note, the mortgage simply stipulating that, if the money be paid by the day named, the mortgage as well as the obligation shall be void; but it may often happen that no separate obligation is taken, and the absence of a bond or other express obligation to pay the money will not make the instrument any less effectual as a mortgage, provided, of course, there is a valid subsisting debt.

produced by the abolition of the common-law doctrine of uses and trusts and the limitation of powers have now confined them to a few states, and even in those states, under the influence of recent legislation, mortgages are to some extent taking their place. In general effect a trust deed is the same as a mortgage, and like a mortgage is a mere security for the payment of money, or for the performance of certain undertakings by the grantor. It is a mere incident to the debt which it secures, and upon which it depends.¹ The same general principles are applicable to this class of conveyances as to other deeds intended only as security, and the chief feature which distinguishes them from mortgages is, that here the conveyance is not made to the creditor direct, but to a trustee who holds a naked trust for the benefit of the holder of the evidence of the indebtedness, which, if negotiable, passes from hand to hand as other commercial paper, the incident of the lien following the note to the hands of the last indorsee, who, on default, may call upon the trustee to execute the trust according to its terms.

The grantor in a trust deed, in declaring the trust, may mold and give it any shape he chooses, and he may provide for the appointment of a successor or successors to the trustee upon such terms as he may choose to impose; but when imposed the terms must be pursued, to render the acts of the successor valid. It is alone by the force of the powers delegated by the deed that the trustee can perform any act with reference to the trust property, and in executing those powers he must pursue them or his acts will be void.²

Equitable mortgages.—It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage when it is executed as security for a loan of money; for the court looks beyond the terms of the instrument to the real transaction, and when that is shown to be

¹ Life Insurance Co. v. White, 106 Ill. 189; Ellis v. Railroad Co., Ill. 67. 107 Mass. 12.

² Equitable Trust Co. v. Fisher,

one of security, and not of sale, it will give effect to the actual contract of the parties.¹ Such a deed carries with it all the incidents of a mortgage; and the rights and obligations of the parties to the instrument are the same as if it had been subject to a defeasance expressed in the body thereof, or executed simultaneously with it.²

It is a further established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security the borrower has in a court of equity a right to redeem the property upon payment of the loan; and this right cannot be waived or abandoned by any stipulation of the parties at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates.³

The legal import of an absolute conveyance is that it carries the fee,⁴ and any contradiction of its apparent effect must arise from extrinsic evidence. The record rarely furnishes any clue to the true character of this class of convey-

¹ *Peugh v. Davis*, 96 U. S. 332; *Klein v. McNamara*, 54 Miss. 90; *Carr v. Carr*, 53 N. Y. 251; *Shays v. Norton*, 48 Ill. 100; *Turner v. Kerr*, 44 Mo. 429; *Moore v. Wade*, 8 Kan. 380; *Kerr v. Agard*, 24 Wis. 378. The rule that parol proof is admissible to show that a conveyance of real estate, absolute upon its face, was intended to be a mortgage or security merely, is recognized and applied for the reason that such evidence is received not to contradict an instrument of writing, but to prove an equity superior to it. *Sanders v. Stewart*, 7 Nev. 200; *Wilcox v. Bates*, 26 Wis. 465.

² *Odell v. Montrose*, 68 N. Y. 499. ³ *Peugh v. Davis*, 96 U. S. 332; *Clark v. Henry*, 2 Cow. 324. And see *Walton v. Cody*, 1 Wis. 420; *Bearss v. Ford*, 108 Ill. 16.

⁴ A conveyance of the legal title to secure the payment of money differs from a statutory mortgage in that the legal title passes to the grantee, the grantor reserving the right in equity to redeem. This right, however, may become barred by the statute of limitations, and when so barred that an action for affirmative relief cannot be maintained thereon, it cannot be interposed as a defense to an action by the grantee to recover possession of the property. *Richards v. Crawford*, 50 Iowa, 494. See *Edwards v. Trumbull*, 50 Pa. St. 509; *Shaw v. Wiltshire*, 65 Me. 485. This result always follows if the instrument be recorded in the record of deeds and not of mortgages. *Brown v. Dean*, 3 Wend. (N. Y.) 208.

ances, the facts governing their equitable nature resting entirely in parol; hence subsequent purchasers for value, without notice, will be protected by the record;¹ and where one in possession of land, under a conveyance absolute on its face, sells the same, his grantee, without notice that his vendor's deed was but a mortgage, will hold the property free from any equity of redemption;² and even though a court of equity afterward decides that the conveyance was only a mortgage, and the mortgagor was entitled to his equity of redemption, the title to the property will not be disturbed, but judgment *in personam* will be given against the mortgagee for the amount equitably due by him to the mortgagor.³

Where a lien on land is expressly reserved in the deed conveying same, which is duly recorded, a clear equitable mortgage is created of which every one is bound to take notice;⁴ but something more than a mere reservation of a right to purchase, or covenant to reconvey, must be shown in order to convert a deed absolute on its face into a mortgage.⁵ There is no positive rule that the covenant to reconvey shall be regarded, either in law or equity, as a defeasance. The owner of lands may be willing to sell at the price agreed upon, and the purchaser may also be will-

¹ It is the settled policy of the law to give security to, and confidence in, titles to the landed estates of the country which appear of record to be good. *McVey v. McQuality*, 97 Ill. 93.

² *Jenkins v. Rosenburg*, 105 Ill. 157.

³ *Baughner v. Merryman*, 32 Md. 186; *Jackson v. McChesney*, 7 Cow. 360; *Grimstone v. Carter*, 3 Paige, 421.

⁴ *Davis v. Hamilton*, 50 Miss. 213; *Armentrout's Ex'r v. Gibbons*, 30 Gratt. (Va.) 652; *Dingley v. Bank*, 57 Cal. 467. As where a deed con-

tains a stipulation that no title shall vest until the purchase-money has been paid (*Pugh v. Holt*, 27 Miss. 461; *Austin v. Downer*, 25 Vt. 558), or that the deed shall be absolute on the payment of certain notes, but in default thereof to be void (*Bank v. Drummond*, 5 Mass. 321). So if it be for the performance of any other duty, such as maintenance of the grantor during life, etc. *Lanfair v. Lanfair*, 18 Pick. (Mass.) 299.

⁵ But see *Peterson v. Clark*, 15 Johns. (N. Y.) 205.

ing to give the vendor the right to repurchase upon specified terms. Such a contract is not opposed to public policy, nor is it in any sense illegal.¹

Equitable mortgages arising from the deposit of title deeds are not generally recognized,² and the doctrine cannot be said to prevail in this country.

Vendors' liens.—It has long been settled that the vendor of real estate, notwithstanding he has conveyed the legal title, has a lien on such estate for the unpaid purchase-money while it remains in the hands of the vendee, or volunteers or purchasers with notice. This, however, applies mainly to implied liens; for where there is a distinct reservation upon the face of the deed of such lien, it has been held to constitute a specific charge upon the land, as valid and effectual as a deed of trust or mortgage;³ and further, that the lien being set forth in the very first link of the vendee's claim of title, purchasers from him have just as much notice of it as they would have had of a lien on the land by mortgage or trust deed.⁴

Statutory forms.—As in case of deeds, statutory forms for mortgages are now prescribed in many states, but like deeds, from their meagerness of detail, have not, in many localities, come into very general use. The statutory words of conveyance and pledge are "mortgage and warrant." The word "mortgages" is sufficient, under the statute, to create a mortgage in fee, while the addition of the words "and warrants" carries the legal import and effect of full covenants of seizin, right to convey, freedom from incumbrances, quiet enjoyment and general warranty.

¹ Hanford v. Blessing, 80 Ill. 188; ³ Armentrout's Ex'rs v. Gibbons, Henley v. Hotaling, 41 Cal. 22; 30 Gratt. (Va.) 632; Carpenter v. Glover v. Payn, 19 Wend. 518. Mitchell, 54 Ill. 126.

² Probasco v. Johnson, 2 Disney (Ohio), 96. The registry of a mortgage is a substitute for the deposit of the title deeds. Johnson v. Stagg, 2 Johns. 510. ⁴ Patton v. Hoge, 22 Gratt. (Va.) 443; Hines v. Perkins, 2 Heisk. (Tenn.) 395; Coles v. Withers, 10 Reporter, 475.

Purchase-money mortgages.—A mortgage for the whole or a part of the purchase-money of the mortgaged property stands upon a somewhat different footing from other conveyances by way of security. The peculiar qualities of a purchase-money mortgage are derived from statutes, under which it becomes a lien upon the entire estate of the mortgagor in the land, freed from any contingent claim of the wife, whether she be a party to the mortgage or not;¹ neither will she be a necessary party to a suit for foreclosure of a purchase-money mortgage, in the execution of which she had not joined, if such suit be brought in the life-time of the husband.²

Mortgages of the homestead.—The jealous care with which the law guards the homestead is never more fully exemplified than in the safeguards and restraints which it has placed upon all attempts to incumber it. In some states no valid mortgage of the homestead can be effected;³ in a majority of the others such mortgage is effectual, only when there has been a special release and waiver of the right;⁴ while in all the states, the free and voluntary assent of the wife, the mortgagor being a married man, is a condition precedent to the vesting of the lien.⁵ Where the statute prescribes formalities relative to acknowledgment, such formalities become matters of substance, and their due observance is in all cases necessary;⁶ but where no particular mode is prescribed, any joint action, properly acknowledged,

¹ Fletcher v. Holmes, 32 Ind. 497; Anderson v. Culbert, 55 Iowa, 233; Amphlet v. Hibbard, 29 Mich. 298; Griffin v. Proctor, 14 Bush (Ky.), 571; Sherrid v. Southwick, 43 Thompson v. Lyman, 28 Wis. 266.

² Fletcher v. Holmes, 32 Ind. 497. Mich. 515; Chambers v. Cox, 23

³ Van Wickle v. Landry, 29 La. Kan. 393.
Ann. 330. And see Moughon v. Masterson, 59 Ga. 835; Campbell v. Elliott, 52 Tex. 151.

⁴ Trustees v. Beale, 98 Ill. 248; Mash v. Russell, 1 Lea (Tenn.), 543; Balkum v. Wood, 58 Ala. 642; Browning v. Harriss, 99 Ill. 456; Warner v. Crosby, 89 Ill. 320. The fact that the deed recites a waiver does not help a defective acknowledgment. Best v. Gholson, 89 Ill. Balkum v. Wood, 58 Ala. 642.

⁵ Long v. Mostyn, 65 Ala. 543; 465.

will probably satisfy the requirement of the voluntary signature and assent of the wife.¹

The only exception to the rules above stated is, when the mortgage is given to secure all or a portion of the unpaid purchase-money, and in this case they all yield to the superior equity of the vendor's lien.²

Mortgage of after-acquired property.—As to the effect of deeds and mortgages of property to which the grantor or mortgagor has no present legal title, and which contain no covenants or other words creating an estoppel, there seems to be much diversity of judicial opinion, though the authorities are in the main harmonious in declaring equitable interests and estates to be proper subjects of conveyance by mortgage.³

The question frequently arises in regard to mortgages of incipient or inchoate rights under the United States land laws, and such mortgages have usually been upheld by the state courts, particularly when the transaction was shown to be one of good faith;⁴ and, when congress has imposed no positive restrictions, the right is usually accorded to one rightfully in possession of the soil to make any valid contract concerning the title to same predicated upon the hypothesis that he may thereafter lawfully acquire it.⁵

So, too, where a railroad company made a mortgage on the property "then belonging to or thereafter to be acquired" by said company, with covenants for further reasonable and necessary conveyances as to subsequently acquired property, it was held that the mortgage became a valid lien upon any interest in real as well as personal estate subsequently ac-

¹ Forsyth v. Preer, 62 Ala. 443. Local statutes must decide these matters; the laws and decisions of other states shed but little light on questions of this character.

² Fletcher v. Holmes, 32 Ind. 497; Amphlet v. Hibbard, 29 Mich. 298; Thompson v. Lyman, 28 Wis. 266.

³ Bank of Greensboro v. Clapp, 76 N. C. 482.

⁴ Woodbury v. Dorman, 15 Minn. 338; Wallace v. Wilson, 30 Mo. 335; Clark v. Baker, 14 Cal. 615; Reasoner v. Markley, 25 Kan. 635.

⁵ Lamb v. Davenport, 18 Wall. 307.

quired by the company for the use of its road, even superior to a vendor's lien for the purchase-money of the lands.¹

Courts of equity will enforce specific execution of contracts and give relief in numerous cases of agreements relating to lands and things in action, or to contingent interests or expectancies, upon the maxim that equity considers that done which, being agreed to be done, ought to be done;² and, in furtherance of this principle, where no rule of law is infringed, and the rights of third persons are not prejudiced, will, in proper cases, give effect to mortgages of subsequently acquired property.³

Effect of informality in mortgages.—Mortgages, or conveyances by way of security in the nature of mortgages, are seldom void for informality unless the informality or omission goes to the groundwork of the instrument; and a mortgage or trust deed otherwise complete, but lacking in some formal particular, though it may be denied legal effect, will be enforced in equity as an equitable mortgage, and this protection will extend to the assignee as well as to the original mortgagee.⁴ This rule has been held to apply in case of a trust deed which omitted the name of the trustee;⁵ and to a mortgage which did not express to be sealed;⁶ and where the seal had been omitted;⁷ where the instrument was imperfectly witnessed, as where there was but one witness, and the statute required two;⁸ to imperfectly acknowledged instruments;⁹ and even to the want of an acknowledgment.¹⁰

¹ *Pierce v. Milwaukee, etc. R. R. Co.*, 24 Wis. 551. And see *Morrill v. Noyes*, 56 Me. 458. Such mortgages form an exception to the general rule that property not in existence cannot be conveyed.

² *Sillers v. Lester*, 48 Miss. 513; *Stevens v. Railroad Co.*, 45 How. (N. Y. Pr.) 104.

³ *Beall v. White*, 94 U. S. 382; *Rice v. Kelso*, 57 Iowa, 115.

⁴ *McQuie v. Peay*, 58 Mo. 56; *McClurg v. Phillips*, 49 Mo. 315.

⁵ *McQuie v. Peay*, 58 Mo. 56.

⁶ *Jones v. Brewer*, 58 Me. 210.

⁷ *Harrington v. Fortner*, 58 Mo. 468; *Van Riswick v. Goodhue*, 50 Md. 57.

⁸ *Gardner v. Moore*, 51 Ga. 268; *Sanborn v. Robinson*, 54 N. H. 239.

⁹ *Haskill v. Sevier*, 25 Ark. 152; *Zeigler v. Hughes*, 55 Ill. 288.

¹⁰ *Black v. Gregg*, 58 Mo. 565.

Whenever a mortgage is sufficient as between the parties it will affect all third parties who have actual knowledge or notice of its existence,¹ and purchasers with such notice will take subject to the equities created by such defective mortgage.²

Covenants in mortgages.—As mortgages are now drawn, personal covenants are not usually inserted; but whenever they are inserted they have the same operation as in deeds of bargain and sale. The words “grant, bargain and sell” are sufficient to create an estoppel, and any subsequent interest the mortgagor may acquire in and to the mortgaged premises will pass by the mortgage or any sale that may be made pursuant to its terms.³

It is a rule, however, in ordinary cases of foreclosure, that the title ordered to be sold is only the title which was held by the mortgagor at the date of the mortgage;⁴ and when a mortgage containing no covenant of warranty has been foreclosed, and the relation of mortgagor and mortgagee extinguished by a sale of the mortgaged premises, the former is under no duty to protect the title of the purchaser, nor is he precluded from subsequently acquiring and claiming under an outstanding and paramount title.⁵ If the premises bring enough to satisfy the mortgage debt it would be inequitable to allow him to claim an interest subsequently acquired by the mortgagor, and which he did not purchase and was no part of the consideration of the sale. If there is a deficiency, that becomes a personal charge against the party bound to pay the debt, in favor of the creditor. Different considerations would apply when the mortgage contained covenants of warranty. In that case the consideration paid would represent the value of the land as warranted, and the mort-

¹Gardner v. Moore, 51 Ga. 268; ³Gibbons v. Hoag, 95 Ill. 45; Teft
Sanborn v. Robinson, 54 N. H. 239; v. Munson, 57 N. Y. 97.

Wilson v. Reuter, 29 Iowa, 176.

⁴Kreichbaum v. Melton, 49 Cal.

²Gardner v. Moore, 51 Ga. 268. 51.

⁵Jackson v. Littell, 56 N. Y. 108.

gagor would be estopped from setting up an after-acquired title, against which he covenanted in the mortgage.¹

Effect of special covenants.—In addition to the ordinary covenants of title and warranty, a series of special covenants are found in mortgages which often do not directly affect title. These covenants are sometimes annexed to conditions and stipulations, but may be separate from them and from the subject to which the stipulations allude. Of this nature is the covenant to keep the mortgaged premises insured for the benefit of the mortgagee. Such a covenant creates a specific equitable lien upon the insurance money, which is valid as against the creditors of the mortgagor. The mortgage being recorded, the covenant acts upon the insurance as soon as effected, runs with the land, and furnishes notice to third persons; and no subsequent assignment or other act can affect the rights of the mortgagee. It is not necessary that the policies be assigned, nor that the mortgagee select the companies; and any act of the mortgagor without the consent of the mortgagee will not defeat the effect of the covenant.²

Special stipulations and conditions.—Many mortgagees insist upon a number of special stipulations and conditions in mortgages accepted by them. The stipulation for insurance for the mortgagee's benefit, being intended to afford security supplementary to and connected with the mortgage, is in equity a sort of adjunct to the mortgage, and is binding on the mortgagor and all others who may succeed to his rights with notice.³ The stipulation that in case of a default in the payment of interest the principal shall imme-

¹ Jackson v. Littell, 56 N. Y. 108. And see Vallejo Land Asso. v. Viera, 48 Cal. 572.

² In re Sands' Ale Brewing Co., 3 Biss. 175. In this matter, the question was raised by the assignee in bankruptcy of the mortgagor.

³ Miller v. Aldrich, 31 Mich. 408. A failure in this respect constitutes such a default as will justify the mortgagee in selling under the power in the mortgage. Walker v. Cockey, 38 Md. 75.

diately become due and payable, and that the mortgagee may immediately proceed to foreclose, is an essential part of the contract and may be enforced;¹ and the same rule applies to the similar stipulation relative to the non-payment of taxes.²

Record of mortgages.—Mortgages come within the provisions of the recording acts, and impart notice in like manner as deeds.³ They are governed in this respect by the same general rules as affect other conveyances, while in several states they are further regulated in regard to priority, etc., by special laws. The registry of a mortgage is notice only to the extent of the sum specified in the record,⁴ and of the property therein described,⁵ and intending purchasers are only chargeable with notice of such facts as the record discloses, and not of undisclosed intent.⁶

If a mortgage is given to secure an ascertained debt, the amount of the debt should be stated; and if it is intended to secure a debt not ascertained, such data should be given respecting it as will put any one interested in the inquiry upon the track leading to a discovery. If it is given to secure an existing or a future liability, the foundation of such liability should be set forth. Without this, a subsequent *bona fide* purchaser, with no actual knowledge or notice of the facts, is not chargeable with notice of the amount secured.⁷

¹ *Gulden v. O'Byrne*, 7 Phil. (Pa.) 93; *Malcom v. Allen*, 49 N. Y. 448; *Meyer v. Graeber*, 19 Kan. 165; *Cook v. Clark*, 68 N. Y. 178.

² *Stanclifts v. Norton*, 11 Kan. 218.

³ *Johnson v. Stagg*, 2 Johns. 510; *Rice v. Dewey*, 54 Barb. (N. Y.) 455; *Hickman v. Perrin*, 6 Coldw. (Tenn.) 135; *Shannon v. Hall*, 72 Ill. 354; *Van Aken v. Gleason*, 34 Mich. 477.

⁴ *Beekman v. Frost*, 18 Johns. 544; *North v. Belden*, 13 Conn. 376. Even though there has been a mistake in recording. *Bullock v. Batten-*

housen, 108 Ill. 28; *Lowry v. Davis*, 69 Ind. 589. But it would seem that the recorder would be liable in damages to any one who might suffer from the error. *Lowry v. Davis*, 69 Ind. 589.

⁵ *Simmons v. Fuller*, 17 Minn. 485; *Galway v. Malchou*, 5 Neb. 285; *White v. McGarry*, 2 Flip. (C. Ct.) 572.

⁶ *Disque v. Wright*, 49 Iowa, 538; *Galway v. Malchou*, 5 Neb. 285; *Herman v. Deming*, 44 Conn. 124.

⁷ So held where the record merely stated that the grantor had on the

As between two mortgages, the first recorded is the prior lien;¹ and where a mortgage and conveyance of the same property are made at the same time, the mortgage, if recorded first, will take precedence of the deed.² The rights of the mortgagee are fixed when he places his mortgage on record, and the subsequent destruction of the record will not, it seems, extinguish or destroy the notice afforded by registration, nor injuriously affect the rights of the mortgagee;³ while as between the original parties,⁴ and their heirs,⁵ the mortgage will still be valid and effective although unrecorded.

Power of sale.—The policy of recent years has been to restrain the execution of powers of sale and to compel the mortgagee to foreclose his lien in chancery. Where this rule now prevails, the following paragraph will have no application.

The power of sale contained in a deed of trust or mortgage must be strictly pursued,⁶ and the utmost fairness must be observed in its execution; but such strictness and literal compliance should not be exacted as would destroy the power.⁷

When permitted by statute, the sale of a mortgaged estate, being made in pursuance of a valid power given by the owner, vests in the purchaser an estate in fee, free from the

same date as the mortgage made his promissory note, payable, etc., without giving the amount. *Bullock v. Battenhausen*, 108 Ill. 28; *Hart v. Chalker*, 14 Conn. 77. But see *North v. Knowlton*, 23 Fed. Rep. 163, where *en semble* a contrary doctrine is indicated.

¹ *Ripley v. Harris*, 3 Biss. 199; *Odd Fellows Sav. Bank v. Banton*, 46 Cal. 603; *Vau Aken v. Gleason*, 34 Mich. 477.

² *Ogden v. Walkers*, 12 Kan. 282.

³ *Shannon v. Hall*, 72 Ill. 354.

⁴ *Cavanaugh v. Peterson*, 47 Tex. 197.

⁵ *McLaughlin v. Ihmsen*, 85 Pa. St. 364.

⁶ *Cranston v. Crane*, 97 Mass. 459.

⁷ *Waller v. Arnold*, 71 Ill. 350.

Parties to mortgage may, by stipulation, regulate the terms of a power of sale of the premises by the mortgagee; and the courts will not interfere to control the right, in the absence of fraud, or of some statutory regulations on the subject. *Elliott v. Wood*, 45 N. Y. 71.

original condition and from any right of redemption;¹ and the power, being coupled with an interest, is irrevocable, and hence may be exercised even after the death of the mortgagee.²

Though one who undertakes to execute a power is bound to a strict compliance, as well as the observance of good faith,³ and a suitable regard for his principal, yet a dereliction in this respect will not usually affect a purchaser in good faith, who being a stranger to the proceedings, and finding them all correct in form, takes the property;⁴ yet as the payment of the debt secured by the trust deed or mortgage defeats the power of sale, a purchaser at a sale made under such power must see to it that the grantor in the deed or mortgage is in default, and that some part of the debt is due and unpaid.⁵

The omission of the power from a mortgage merely limits the mode of foreclosure to that by bill in equity,⁶ while its insertion does not oust the jurisdiction of a court of equity, nor preclude a party from resorting to that tribunal. It is cumulative only.⁷ In its general nature it is a power coupled with an interest, is irrevocable, appendant to the land, and passes by an assignment of the mortgage and secured debt;⁸ it is not impaired by the death of the mortgagee, nor by lapse of time, if not unreasonable, in closing the sale made under it, and covers the equity of redemption, not only of a husband, but also that of his wife surviving him.⁹

¹ Kinsley v. Ames, 2 Met. 29.

² Berger v. Bennett, 1 Caines' Cas. (N. Y.) 1. Local statutes may, however, serve to modify the statement of the text.

³ If a sale is made by a mortgagee under a power in a mortgage, not in good faith, but in fact for himself, to whom the purchaser conveys, the sale is not void, but only voidable in equity, and it may be set aside while the title remains in the mortgagee, but not after trans-

fer to a *bona fide* purchaser. Gibbons v. Hoag, 95 Ill. 45.

⁴ Montague v. Dawes, 14 Allen, 369.

⁵ Ventres v. Cobb, 105 Ill. 33.

⁶ Cowles v. Marble, 37 Mich. 158.

⁷ McAllister v. Plant, 54 Miss. 106.

⁸ McGuire v. Van Pelt, 55 Ala. 344; Strother v. Law, 54 Ill. 413; Hyde v. Warren, 46 Miss. 13; Brown v. Delaney, 22 Minn. 349.

⁹ Strother v. Law, 54 Ill. 413.

Assignment of mortgage.—The interest of a mortgagee, whether regarded as a lien or an estate, is assignable in law by a proper instrument purporting to convey the same, while the assignment of the notes secured by the mortgage operates in equity as an assignment of the mortgage itself.¹ In the latter case the assignment of the debt carries with it the security for the debt, and ordinarily whoever owns the debt is likewise the owner of the mortgage.²

Assignments of mortgages, however, are usually made by an instrument in writing and under seal, which, when recorded, affords constructive notice of the rights of the assignee to all persons, as against any subsequent acts of the mortgagee affecting the mortgage, and protects as well against an unauthorized discharge as against a subsequent assignment by the mortgagee.³ The law does not require the assignment to be recorded, as essential to its validity, nor is it necessary for the purposes of foreclosure; and assignments are excepted from the operation of the recording laws of many of the states.

With respect to the necessity of registration for priority

¹ *Holmes v. McGinty*, 44 Miss. 94; *Moore v. Cornell*, 68 Pa. St. 322; *Blake v. Williams*, 3 N. H. 39; *Croft v. Bunster*, 9 Wis. 503; *Potter v. Stevens*, 40 Mo. 229. An assignment in law is not recognized in some states.

² *Kurtz v. Sponable*, 6 Kan. 395; *Nelson v. Ferris*, 30 Mich. 497; *Preston v. Morris Case & Co.*, 42 Iowa, 549; *Mulford v. Peterson*, 35 N. J. L. 129; *Conner v. Banks*, 18 Ala. 42; *Bell v. Simpson*, 75 Mo. 485. Where a party is so related to a mortgage that he is not personally liable upon it, but is obliged to pay it to save his estate, and he does pay it, the payment will be presumed to be made for that purpose, and in such case no assignment of

the mortgage to the person paying it, nor proof of an intention on his part to keep it alive, is necessary to give him the benefit of it. *Walker v. King*, 44 Vt. 601. And in like manner a party paying a decree of foreclosure becomes invested with the rights of the mortgagee and the assignee in equity of the mortgage; although in this case the mortgage is in fact paid, yet equity will require it to subsist until every party who owes a duty under the mortgage shall have discharged it. *Wheeler v. Willard*, 44 Vt. 640.

³ *Viele v. Judson*, 82 N. Y. 32; *Stein v. Sullivan*, 31 N. J. Eq. 409; *Torrey v. Deavitt*, 12 Reporter, 508.

of title, the same general rule prevails between different assignees of a mortgage as between grantees in ordinary deeds,¹ and a release by the mortgagee, no assignment appearing of record, will effectually divest the lien, notwithstanding an assignment has in fact been made.²

In a few states a mortgage is not assignable, either by the statute or by the common law; the assignment of the note carries the mortgage with it, but only in equity, and trust deeds given as security for a loan, being regarded in the nature of mortgages, stand upon the same footing as regards assignability.³

Operation and effect of assignments.—Though there are not wanting authoritative decisions to the contrary, yet the later and more generally received doctrine seems to be that an assignment is to be regarded only as the transfer of a mere chose in action, and not an interest in lands, the debt being considered as the principal and the land only the incident;⁴ and that the assignee takes it charged with the notice which his assignor had of prior incumbrances, and subject not only to any latent equities that exist in favor of the mortgagor, but also subject to equities in favor of third persons.⁵

Formal requisites of assignments.—Though the earlier decisions hold that the interest of a mortgagee may be

¹ Wiley v. Williamson, 68 Me. 71; Trust Co. v. Shaw, 5 Sawyer (C. Ct.), 336; McClure v. Burris, 16 Iowa, 591; Torrey v. Deavitt, 53 Vt. 331; Bacon v. Van Schoonhoven, 87 N. Y. 446.

² Mitchell v. Burnham, 44 Me. 303; Bank v. Anderson, 14 Iowa, 544; Johnson v. Carpenter, 7 Minn. 176; Union College v. Wheeler, 61 N. Y. 88; Baldwin v. Sager, 70 Ill. 505; Ayers v. Hays, 60 Ind. 452; Swartz v. Leist, 13 Ohio St. 419.

³ Olds v. Cummings, 31 Ill. 188; Walker v. Dement, 42 Ill. 272; Baily v. Smith, 14 Ohio St. 396.

⁴ Delano v. Bennett, 90 Ill. 533; Hitchcock v. Merrick, 18 Wis. 357; Paige v. Chapman, 58 N. H. 333; Bennett v. Saloman, 6 Cal. 134.

⁵ Sims v. Hammond, 33 Iowa, 368; Mason v. Ainsworth, 58 Ill. 163; Schofer v. Reilly, 50 N. Y. 61; Crane v. Turner, 67 N. Y. 437; Coffin v. Taylor, 16 Ill. 457; Olds v. Cummings, 31 Ill. 188.

transferred or conveyed by the same form of deeds by which the owner of the legal estate can convey it,¹ the current of later cases pronounces a contrary doctrine. The mortgagee's interest, being a mere chattel interest, is inseparable from the debt it is given to secure;² and, not constituting an estate or interest in the land, will not pass by any conveyance of the same. Hence a deed of all the grantor's "estate, title and interest" in the mortgaged premises,³ or a conveyance of all his "lands, tenements and hereditaments,"⁴ will not operate as an assignment of a mortgage; and generally, any conveyance or attempted conveyance of the mortgagee's interest before foreclosure, not accompanied by a transfer of the debt secured, is a nullity.⁵

The interest owned by the mortgagee has reference solely to the mortgage debt, and any instrument which describes the parties and the indebtedness, and sufficiently identifies the mortgage, will be effective as an assignment without reference to the mortgaged premises, while the instrument, in form, should purport to be a transfer of the mortgage itself and of the debt thereby secured, and not of the mortgaged premises.⁶

¹ *Welch v. Priest*, 8 Allen (Mass.), 165; *Cutler v. Davenport*, 1 Pick. 81. And see *Connor v. Whitmore*, 62 Me. 186; *Stewart v. Barrow*, 7 Bush (Ky.), 368. But this is when the legal estate passes to the mortgagee.

² *Mack v. Wetzler*, 39 Cal. 247; *Seckler v. Delfs*, 25 Kan. 159; *Trim v. Marsh*, 54 N. Y. 599.

³ *Swan v. Yapple*, 35 Iowa, 248; *Runyan v. Messereau*, 11 Johns. 534; *Delano v. Bennet*, 90 Ill. 533.

⁴ *Mack v. Wetzler*, 39 Cal. 247.

⁵ *Delano v. Bennett*, 90 Ill. 533; *Swan v. Yapple*, 35 Iowa, 248; *Johnson v. Cornett*, 29 Ind. 59; *Ellison v. Daniels*, 11 N. H. 274. But if the mortgagee is in possession under

his mortgage, his conveyance, while it would be ineffectual as regards the title, might yet be sufficient to confer on his grantee a right of possession. *Welsh v. Phillips*, 54 Ala. 309.

⁶ When the mortgage is regarded as a mere incident to the debt this would be sufficient, but more would be required in states where the mortgagee holds the legal title and estate. In such states an assignment of the mortgage, in terms which do not profess to act upon the land, would not pass the mortgagee's estate in the land, but only the security it affords to the holder of the debt. *Williams v. Teachey*, 85 N. C. 402.

Release and satisfaction.—Where no satisfaction appears of record, the law will presume a payment of the debt it was given to secure, where the mortgagee has failed to exercise his right of foreclosure for the period of twenty years,¹ and the mortgage will cease to be a lien after the expiration of that period.² The mortgage may also be satisfied by foreclosure, but the term “satisfaction,” as ordinarily used, refers to a specific acknowledgment of payment and discharge of the lien as evidenced by some written instrument.

Though the terms “release” and “satisfaction” are used interchangeably, there is yet an important distinction between them. A satisfaction implies a payment of the debt, and *ipso facto* an extinguishment of the lien, whereas a release or discharge may relieve the land from the burden of the debt without in the least impairing its legal efficacy.³

Form and requisites of release.—The general requisites of a release of mortgage differ somewhat, according to the light in which it is to be regarded. Where the mortgage retains its common-law character of a conveyance of the legal estate, a deed under seal with apt words of conveyance would be necessary to revest the title of the mortgagor, which might be effected by a deed of release and quitclaim;⁴ but where it is regarded only in the character of a lien or security, any instrument showing an intention to relieve the land from the burden, or acknowledging payment or satisfaction of the debt secured by the mortgage, will be suffi-

¹Goodwin v. Baldwin, 59 Ala. 127; Lawrence v. Ball, 14 N. Y. 477; Emory v. Keighan, 88 Ill. 482; Howland v. Shurtleff, 2 Met. (Mass.) 26. The presumption is disputable, however. Cheever v. Perley, 11 Allen (Mass.), 588.

²This follows as a result of the statute of limitations. See, also, Blackwell v. Barnett, 52 Tex. 326; Whitney v. French, 25 Vt. 663;

Pollock v. Maison, 41 Ill. 516; Locke v. Caldwell, 91 Ill. 417. And consult 4 Kent's Com. 189; Jackson v. Wood, 12 Johns. 242.

³Adginton v. Hefner, 81 Ill. 341.

⁴Waters v. Jones, 20 Iowa, 363; Allard v. Lane, 18 Me. 9; Perkins v. Pitts, 11 Mass. 125. And see 2 Jones on Mortgages (2d ed.), § 972 *et seq.*

cient to divest the lien and restore the land to its original condition.¹ The latter instrument is that now generally used, and, as a rule, it is required by statute to be executed by the mortgagee or his assignee, and acknowledged or proved in the manner provided by law to entitle conveyances to record, and must specify that such mortgage has been paid, or otherwise satisfied or discharged. No other formalities seem necessary, and such certificate, popularly known as a "satisfaction piece," has the same effect as the old deed of release.² In a few states a modified form of a release deed is still preserved, though its operation and effect is almost identical with the certificate of payment or "satisfaction piece" of the other states. It is customary, but not essential, to describe the property, and, except in case of partial releases, such description has no other effect than to give greater certainty to the instrument in the identification of the land.

Release by trustee.—Where by a trust deed, duly recorded, land is conveyed to trustees in fee, and they are authorized to release same to the grantor upon payment of the indebtedness thereby secured, a release before payment would be a breach of their trust and would be unavailing in equity to any one who had knowledge of the breach.³ But, being vested with the legal title, the same would pass by their deed of release to the releasee,⁴ and a second conveyance by him to one having no knowledge of such breach, the records, or a conveyancer's abstract thereof, showing the land to be

¹Headley v. Gaundry, 41 Barb. 279; Thornton v. Irwin, 43 Mo. 153; Lucas v. Harris, 20 Ill. 165. Van Schoonhoven, 87 N. Y. 446. It takes the place of a release. Ibid. And see Merchant v. Woods, 27 Minn. 396.

²A satisfaction piece is a conveyance within the meaning of the recording acts, and one who buys or advances money to be secured by mortgage on the premises is a bona fide purchaser within the provisions of said acts. Bacon v. Insurance Co. v. Eldredge, 102 U. S. 545.

³Insurance Co. v. Eldredge, 102 U. S. 545. ⁴Taylor v. King, 6 Munf. (Va.) 358; Den v. Trautman, 7 Ired. (N. C.) 155.

unincumbered, would vest the legal title in such grantee, or, if made by way of pledge, would entitle the indebtedness thereby secured to priority of payment.¹

A far greater degree of care must be observed, however, with respect to the releases of a trustee than of a mortgagee, and purchasers are chargeable with notice of all the recitals of a trust deed. They are bound to observe the limited power of the trustee to release the pledged property, the time the notes for which it was given have to run, and the terms which authorize a reconveyance; and where a release is made before the maturity of the notes, they being negotiable, a purchaser should insist upon their production or of satisfactory evidence showing that they have been surrendered or paid.

Marginal discharge.—A release or discharge made by entry upon the margin of the record of the mortgage or other instrument is in common use in all the states, and when made by the owner of the mortgage, with whatever formalities may be prescribed by law, is as effectual in divesting the lien of record as a formal and separate satisfaction piece or release.² It will be understood, however, that the authority of the person so undertaking to make the discharge must affirmatively appear of record, for a marginal entry of satisfaction by a stranger, without authority, is void, although he claims to be the assignee of the mortgage and owner of the indebtedness;³ and where a person purporting to be the “assignee of said mortgage” assumes to discharge same, but no assignment appears of record, this constitutes a radical defect in the title.⁴

¹ Williams v. Jackson, 15 Reporter, 705; Barbour v. Scottish-American Mtg. Co., 102 Ill. 121.

² A purchaser finding a mortgage satisfied of record by a marginal entry, and upon the faith of which, without actual notice of a mistake, pays the purchase price, will take the title clear of the mortgage, al-

though it turns out that the entry was a mistake which would be rectified as between the parties. Ayers v. Hays, 60 Ind. 452.

³ De Laoreal v. Kemper, 9 Mo. App. 77.

⁴ Torrey v. Deavitt, 12 Reporter, 508.

When a mortgage or deed of trust is duly recorded, the person whose property is incumbered thereby is entitled, upon fully paying and satisfying the debt to secure which such mortgage or trust deed was given, to have satisfaction of the same entered upon the margin of the record. And a mortgagee or trustee who fails or refuses, when duly requested, to enter up such satisfaction or to execute a deed of release, is liable in damages to the party aggrieved.¹

Foreclosure.—Foreclosures by entry and possession, or strict foreclosures, are now rarely pursued or allowed in a majority of the states, while in many they are positively prohibited. They are regarded by courts as severe remedies, inasmuch as they transfer the absolute title without sale, and sometimes without notice, no matter what the value of the premises. In like manner foreclosures by advertisement and sale, so called, are now generally discountenanced even where allowed, and resort is usually had to a court of equity to perfect a title acquired through this channel.

(f) *Convejances of Chattels Real.*

Generally considered.—When the great lords emancipated their villeins they still continued to employ them in the cultivation of their estates, the possession and profits of which they granted to them either from year or for a certain number of years, reserving to themselves for such use an annual return from the tenant of corn or other provisions. Hence the lands thus granted were called *farms*, from the Saxon word *feorm*, which signifies provision. This compensation, or return for the use of the land thus let, acquired the name of *rent*.² At common law rent is a species of incorporeal property, and under the English land system it has assumed a large number of forms to meet the varying exigencies of the times and conditions of the people.³

¹ *Verges v. Giboney*, 47 Mo. 171; ² *Cruise, Dig.*, tit. 28, ch. 1.
Sherwood v. Wilson, 2 Sweeny ³ See 2 *Black. Com.* 41; *Cruise*,
(N. Y.), 648. This is the general *Dig.*, tit. 28; 3 *Kent, Com.* 460.
statutory doctrine.

Rent might be reserved, at common law, upon every form of conveyance which either passed or enlarged an estate, but was usually reserved on what was termed a *lease*.

At present it may be stated generally that a lease is a contract for the possession and profits of land and tenements on the one side, and a recompense of rent or other income on the other; or it is a conveyance to a person for life or years, or at will, in consideration of such rent.¹ The grantor of a lease is called the *landlord* or *lessor*; the grantee is known as the *tenant* or *lessee*, while the interest granted is technically denominated the *term*.² The word "term" in this connection denotes not only the duration of the interest of the lessee, but also the interest itself.

The estate or interest conveyed by a lease is personal in its nature, whatever may be the duration of the term, and, falling below the character and dignity of a freehold, it is regarded as a chattel interest, and is governed and descendible in the same manner.³ When made in writing, as it must be if the term exceeds one year in duration, a lease is usually mutually signed in duplicate and interchangeably delivered by the parties;⁴ but if only signed by the lessor, its acceptance by the lessee raises a promise on his part to pay the rent reserved and faithfully observe all the stipulations and conditions which the lease shows were to be observed or performed by him.⁵

Whether an instrument shall be considered a lease, or only an agreement for one, depends on the intention of the parties, as collected from the whole instrument; and the law will rather do violence to the words than break through the

¹ Jackson v. Harsen, 7 Cow. 326;
² Bl. Com. 217.

² From *terminus*, signifying that it is bounded and precisely determined, having a certain beginning and certain end. 2 Flint, Real Prop. 203.

³ 2 Kent, Com. 342; Goodwin v. Goodwin, 33 Conn. 314.

⁴ The copy delivered to the tenant is called the *original* lease, the one to the landlord the *counterpart*; but for all practical purposes both are regarded as original. Dudley v. Sumner, 5 Mass. 438; Taylor's Landlord and Tenant, 106 (6th ed.).

⁵ Pike v. Brown, 7 Cush. 134.

intent of the parties by construing such an instrument as a lease, when the intent is manifestly otherwise.¹

The proper definition of a lease embraces only such instruments of conveyance as transfer to the lessee a less estate than is possessed by the lessor, thus leaving a reversion in him,² and this is the sense in which the term is now employed; yet formerly it was not uncommon to grant land in fee, reserving an annual rent charge, notwithstanding there was no reversion to the person entitled to it; and the covenant to pay such rent ran with the land, as well as the condition of re-entry for its non-payment.³

Creation of a term.—Notwithstanding the fact that it is customary to insert in conveyances by way of lease a large number of covenants, stipulations and agreements creating contractual relations oftentimes of a complicated nature, yet the essence of an instrument of this kind is extremely simple. A term of years may be created by any form of expression showing an intention on the part of the lessor to transfer possession, and a reciprocal intention on the part of the lessee to assume same. The usual words of grant are “demise, lease, and let,” or, “to farm let,” and these words have been held to import the creation of a term to begin presently, and not at a future day or upon a contingency;⁴ but their use is not indispensable to constitute a valid lease.⁵

The proper words to be used in creating a limitation upon a term demised are, “while,” “as long as,” “for, during and until;” but, like other technical words, they have now but little special efficacy, and any other words which show intention will do as well.⁶

¹ Jackson v. Delacroix, 2 Wend. 433.

² Willard's Conveyancing, 425.

³ Van Rensselaer v. Hays, 5 Smith, 68; 2 Sugd. Vend. 725, Perkins' ed., 177; Jackson v. Allen, 3 Cow. 230.

⁴ See Cong. Meeting House v. Hilton, 11 Gray (Mass.), 409.

⁵ Moshier v. Reding, 12 Me. 135; Moore v. Miller, 8 Pa. St. 272; Jackson v. Delacroix, 2 Wend. (N. Y.) 438.

⁶ Vannatta v. Brewer, 32 N. J. Eq. 268; Hallett v. Wylie, 3 Johns. (N. Y.) 44. And see Taylor, Land. and Ten., 114.

Property subject to lease.— As a general rule the possession and profits of any species of real property may be the subject of lease, and when the statute interposes no prohibition such lease may be for any length of time. To avoid perpetuities, as well as the creation of large manorial estates, a majority of the states have, either by a constitutional provision or an express statutory enactment, prohibited the lease or grant of agricultural land for a longer period than twelve or fifteen years, and leases made in contravention of this prohibition, in which there is reserved any rent or service of any kind, are declared to be void. The leases or grants contemplated by the law are such as are held by the tenant upon a reservation of an annual or periodical rent or service, to be paid as a compensation for the use of the estate granted. It is still competent to make a grant for life, or lives, upon a good consideration to be paid for the estate, which consideration may be payable at once, or by instalments, or in services, so that it be not by way of rent. To bring it within the law there must be a reservation of rent or service.¹ A *reservation* is defined as a keeping aside, or providing, as when a man lets, or parts with his land, but reserves, or provides himself a rent out of it for his livelihood; and a rent is said to be a sum of money, or other consideration, issuing yearly out of lands and tenements. It must be profit, but it is not necessary that it should be money. The profit must be certain, and it must also issue yearly.²

Covenants and conditions.— Owing to the ignorance generally prevailing of the legal effects of covenants in leases and other instruments, which are often executed without any particular inspection or knowledge of their contents, people are often surprised into contracts which neither party intended when the instrument was executed.³ The words

¹ Parsell v. Stryker, 41 N. Y. 480.

² Phillips v. Stevens, 16 Mass. 239.

³ Stephens v. Reynolds, 6 N. Y.

458. And see 2 Black. Com. 41.

“yielding and paying,” etc., constitute a covenant for the payment of rent,¹ which runs with the land, and formerly, if not qualified by any exception or condition, bound the tenant to pay rent during the continuance of the term, notwithstanding the premises were destroyed by fire during the tenancy.² Covenants for rebuilding, repairing, etc., run with the land and are obligatory upon both parties and their assigns,³ according as either of the parties are bound. The covenant to pay for any buildings, erected by the tenant, at the expiration of the term, runs with the land and inures to the benefit of the assignee.⁴

The covenant of renewal is one of the most important, and like those just mentioned is incident to the land.⁵ A covenant to renew implies the same term and rent, but not the same covenants,⁶ and is satisfied, even though it be to renew under the same covenants contained in the original lease, by a renewal omitting the covenant to renew.⁷ The burden of the payment of taxes and assessments is frequently assumed by the tenant, particularly in long terms, but whether assumed by lessor or lessee it runs with the land, and binds the respective assigns.⁸

The covenants of leases are usually protected by a condition avoiding the estate and working a forfeiture in case of breach, and this condition is of the essence of the lease.

Implied covenants.—It is a fundamental principle that the law will always imply covenants against paramount title,

¹ De Lancy v. Ganong, 5 Seld. 9.

² Hallett v. Wylie, 3 Johns. 44.

³ Allen v. Culver, 3 Denio, 284.

⁴ Lametti v. Anderson, 6 Cow. 302; Van Ransselaer v. Pennimar, 6 Wend. 569.

⁵ Sutherland v. Goodnow, 108 Ill. 528.

⁶ Rutgers v. Hunter, 6 Johns. Ch. 218. The covenant for renewal may be specially enforced, provided the application be made within a reasonable time after the

expiration of the former lease, and the owner of the reversion or fee will be compelled to execute a new lease. Banks v. Haskie, 45 Md. 209.

⁷ Carr v. Ellison, 20 Wend. 178. A covenant to renew which does not state the terms or length of time of such renewal has been held void for uncertainty. Laird v. Boyle, 2 Wis. 431.

⁸ Post v. Kearny, 2 Comst. 394; Oswald v. Gilfert, 11 Johns. 443.

and against such acts of the landlord as destroy the beneficial enjoyment of the premises.¹ This results from the principle of law that every grant carries with it an implied undertaking on the part of the grantor that the grant is intended to be beneficial, and that, so far as he is concerned, he will do no act to interrupt the free and peaceable enjoyment of the thing granted.² To attain this, however, there must, as a rule, be some express words of grant, but "lease" or "demise" will be sufficient.

Assignment of lease—Sub-tenancy.—To constitute an assignment of a leasehold interest, the assignee must take precisely the same estate in the whole or in a part of the leased premises which his assignor had therein. He must not only take for the whole of the unexpired term, but he must take the whole estate, or, in other words, the whole term;³ for the word "term" does not merely signify the time specified in the lease, but the estate also and interest that passes by the lease; and therefore the term may expire during the continuance of the time, as by surrender, forfeiture, and the like.⁴ The grant of an interest, therefore, which may possibly endure to the end of the term is not necessarily a grant of all the estate in the term.

If, by the terms of the new conveyance, it be in the form of a lease or an assignment, and new conditions with a right of entry or new causes of forfeiture are created, then the tenant holds by a different tenure and a new leasehold interest arises, which cannot be treated as an assignment or a continuation to him of the original term. When an estate is conveyed to be held by the grantee upon a condition subsequent, there is left in the grantor a contingent reversionary interest;⁵

¹ Wade v. Halligan, 16 Ill. 507; Playter v. Cunningham, 21 Cal. 233; Maule v. Ashmead, 20 Pa. St. 482; Hamilton v. Wright, 28 Mo. 199.

² See Dexter v. Manley, 4 Cush. (Mass.) 24.

³ Van Ransselær v. Gallup, 5 Denio, 454. The purchaser under a mortgage of all the estate of a lessee is an assignee. Kearney v. Post, 1 Sandf. 105.

⁴ 2 Black. Com. 144.

⁵ Austin v. Cambridgeport Parish,

and where, by the terms of an instrument which purports to be an under-lease, there is left in the lessor a contingent reversionary interest, to be availed of by an entry for breach of condition which restores the sub-lessor to his former interest in the premises, the sub-lessee takes an inferior and different estate from that which he would acquire by an assignment of the remainder of the original term; that is to say, an interest which may be terminated by forfeiture, on new and independent grounds, long before the expiration of the original term. If the smallest reversionary interest is retained, the tenant takes as sub-lessee, and not as assignee.¹

3. *Fiduciary or Official Conveyances.*

Defined and distinguished.—Official deeds comprise all those conveyances wherein the grantor acts by virtue of an office, and not in his individual or personal capacity. They cover a wide portion of the field of conveyancing and assume a variety of shapes, but may be reduced to two general classes, viz.: (a) Those made by *trustees*, and (b) those made by *executive and ministerial officers*. The former class embraces all forms and modes of conveyance by persons acting in a purely fiduciary capacity, and whose authority is derived through some direct delegation of power emanating from the person last seized. This power is reposed in the donee as a confidence, and is illustrated in the case of trustees, executors, etc. The latter class, while in every proper sense of the word fiduciary conveyances, are made by persons who act in a ministerial capacity as the executive officers of courts, as in the case of sheriffs, masters, administrators, etc. The rules for construing deeds are much the same, whether the deed be made by a party in his own right, or by a fiduciary or officer of the court.²

It is the policy of the law to invest the sheriff, master in chancery, administrator, etc., in making sales of real estate,

21 Pick. 215; Brattle Square Church 774; McNeil v. Kendall, 128 Mass. v. Grant, 3 Gray, 147. 245.

¹ Dunlap v. Bullard, 11 Reporter, ² White v. Luning, 93 U. S. 515.

with only a mere naked power to sell such title as the debtor, deceased person, etc., had, without warranty, or any terms except those imposed by law. Hence a purchaser at such sales takes the risk of the title and the validity of the proceedings under which the sale is made.¹ The power to sell lands, however conferred, must, as a rule, be strictly pursued, otherwise the sale will be void and no title will pass;² and a deed which shows on its face an excess of authority in the officer executing it will not be sufficient to sustain the title of one claiming under it.³

There are no implied covenants in official deeds,⁴ and where the deed contains express covenants they have been held to bind the officer personally.⁵

The recitals in official deeds are usually regarded only as matters of inducement,⁶ and are not of their essence unless prescribed by statute, in which event they become substance.⁷ They are usually taken as evidence against the grantee and those claiming under him,⁸ and as to such parties are conclusive.⁹ They are further regarded as presumptive evidence of the facts stated and will prevail until the contrary is shown.¹⁰

¹ Bishop v. O'Connor, 69 Ill. 431.

² King v. Whiton, 15 Wis. 684; White v. Moses, 21 Cal. 44.

³ G. B. & M. C. Co. v. Groat, 24 Wis. 210; French v. Edwards, 13 Wall. 506. The deed in this case was by a sheriff under a judgment for taxes. The deed recited the sale of the property to the highest bidder, when he was authorized by the statute only to sell the smallest quantity of the property which any one would take and pay the judgment and costs, and was held void on its face.

⁴ Webster v. Conley, 49 Ill. 13.

⁵ Prouty v. Mather, 49 Vt. 415; Summer v. Williams, 8 Mass. 162; Mitchell v. Haven, 4 Conn. 485;

Aven v. Beckom, 11 Ga. 1; Craddock v. Stewart's Adm'r, 6 Ala. 77; Magee v. Mellon, 23 Miss. 586.

⁶ Leland v. Wilson, 34 Tex. 79; Foulk v. Coburn, 48 Mo. 225; Warner v. Sharp, 53 Mo. 598; Jones v. Scott, 71 N. C. 192. A clerical error in the recitals is not to be regarded in equity. Stow v. Steele, 45 Ill. 328.

⁷ Atkins v. Kinman, 20 Wend. 249.

⁸ French v. Edwards, 13 Wall. 506; Fisk v. Frores, 43 Tex. 340; Lamar v. Turner, 48 Ga. 329.

⁹ Durette v. Briggs, 47 Mo. 356; Pringle v. Dunn, 37 Wis. 449; Robertson v. Guerin, 50 Tex. 317.

¹⁰ Chase v. Whiting, 30 Wis. 544.

(a) *Conveyances by Trustees.*

Trustees' deeds generally.—The nature and operation of trusts as well as the duties and obligations of trustees has been referred to in other portions of this work, and there remains now but to glance at the methods of the execution of trusts by trustees and the disposal of the trust estate.

In the management and disposition of trust property the conduct of trustees must be regulated and controlled by the provisions of the deed of trust or other instrument under which they hold. This makes the law by which they are governed; and trustees accepting the trust upon the terms and conditions of the instrument creating the same have no power to alter, change or dispense with those terms or conditions. If the instrument minutely and particularly prescribes the circumstances under which and the manner in which the trustees shall have authority to sell or otherwise dispose of the trust estate, they have no power or authority to dispose of it under any other circumstances or in any other manner.¹ So, too, those who deal with them on the faith of the trust estate must be aware that they exercise only limited and delegated powers, and are bound, at their peril, to take notice of such powers and see to it that they confine themselves within their scope.²

A trustee having once accepted the trust in any manner, a purchaser cannot safely dispense with his concurrence in a sale of the trust estate, notwithstanding he may have attempted to disclaim, and although he may have released his estate to his co-trustees. All the trustees, in case of several, must unite in a disposal of the trust property, and a deed by two, while a third is living, is not valid. The trustees take as joint tenants and must all unite in the execution of the trust, and especially in a deed of lands.

Where a trustee's deed, made upon a sale under a valid

¹Huntt v. Townshend, 31 Md. Vernon v. Board of Police, 47 Miss. 336; Tyson v. Latrobe, 42 Md. 337. 181; Ventres v. Cobb, 105 Ill. 33.

²Owen v. Reed, 27 Ark. 122;

deed of trust, shows the sale to have been made in strict conformity with the power contained in the trust deed, and the purchaser has had no notice of any irregularities in the sale, his title will be protected, as respects any such irregularities, if any there were, as that of an innocent purchaser.¹

When purchaser must see to application of purchase-money.—The doctrine of the obligation of purchasers to observe the proper application of the purchase-money in cases of sales by heirs, devisees, trustees and other fiduciaries was formerly very intricate and profound, abounding in nice distinctions and subtle gradations; but these, in a large measure, have been swept away by special statutes in England, while in the United States the old English doctrine has rarely been administered except in cases of fraud in which the purchaser was a participant. The general rule now is, and for years past has been, that a purchaser who in good faith pays the purchase-money to a person authorized to sell is not bound to look to its application; and there is no difference in this respect between lands charged in the hands of an heir or devisee with the payment of debts, and lands devised to a trustee to be sold for that purpose.²

The present rule of law in regard to trust estates is that when the trustee holds the trust estate for the purpose of sale and conversion into money, or with a power of sale and conversion, any one who in good faith accepts such transfer upon adequate compensation will acquire a valid title. But if the trustee has no power of sale the purchaser will acquire no title unless he shows that the purchase-money has been applied to the purposes of the trust. It is this which marks the true distinction between the cases where the purchaser is bound to see to the application of the purchase-money and where he is not.³

¹ *Hosmer v. Campbell*, 98 Ill. 572; (N. Y.), 275; *White v. Carpenter*, *Montague v. Dawes*, 14 Allen 2 Paige (N. Y.), 217; *Gardner v. (Mass.)*, 369. *Gardner*, 3 Mason (C. Ct.), 178. And

² *Cryder's Appeal*, 11 Pa. St. 72; see *Warvelle on Vendors*, 577.

Champlin v. Haight, 10 Paige ³ 3 Redf. on Wills (3d ed.), 620.

Mortgagees' deeds.—Mortgagees' deeds, made in pursuance of a power of sale, differ in no important particular from conveyances by trustees, the mortgagee being, for the purposes of the conveyance, an executor of an express trust. He is held to the same strict rules that regulate the conduct of other trustees, and cannot exceed the express powers under which he acts. A mortgagee may sell the equity of redemption of the mortgagor and such interest as is conveyed to him by the mortgage under which he sells, but he cannot sell the equity of redemption by itself; nor can he sell an undivided portion of his interest in the land included in the mortgage. A proper execution of the power of sale requires him to sell all he is entitled to under it,¹ and for the same reason he has no right to sell a greater interest than the mortgage gives him or authorizes him to sell. A violation of these rules will render the sale invalid.²

The recitals of a mortgagee's deed are material to its validity, as tending to show a due execution of the power and compliance with the conditions of the trust.³

The original purchaser at a sale by a mortgagee, under a power of sale contained in the mortgage, is chargeable with notice of defects and irregularities attending the sale, and cannot evade the effect;⁴ but it would seem that as to remote purchasers, the sale is only voidable on proof of actual knowledge of such defects acquired before the consideration has been paid.⁵ It has been held, however, that a properly executed deed reciting strict conformity, the purchaser hav-

¹ *Fowle v. Merrill*, 10 Allen, 350; *Torrey v. Cook*, 116 Mass. 163.

² *Donohue v. Chase*, 11 Reporter, 225.

³ *Gibbons v. Hoag*, 95 Ill. 45. Where a deed for land sold under a power in a mortgage, reciting correctly all the facts showing a right to make the sale, is recorded in apt time, the record thereof will affect all persons thereafter claim-

ing under the mortgagee with constructive notice that there had been a valid sale under the power, although the deed may be defectively executed so as not to pass the legal title. *Gibbons v. Hoag*, 95 Ill. 572.

⁴ *Hamilton v. Lubukee*, 51 Ill. 415. But see *Hosmer v. Campbell*, 98 Ill. 572.

⁵ *Grover v. Hale*, 107 Ill. 633.

ing no actual knowledge or notice of any irregularity and taking such deed upon the strength of the assurances therein contained, will protect the title of such purchaser.¹

Executors' deeds.—A testamentary executor stands in the place of and represents his testator. He derives his power primarily from the will, and in this respect differs somewhat from an administrator, whose sole power is derived from the law and the directions of the court.² When acting under a naked testamentary appointment his powers are co-extensive with those of an administrator, and he is bound by the same rules and subject to the same restrictions. But the executor may also be a trustee,³ and, when acting as such, the scope of his powers is measured and limited by the will which appoints him. The distinction, therefore, must ever be kept in view of the powers and duties of an executor, as such, and those which may devolve upon him as trustee, and not as executor.⁴ Under his testamentary authority he may sell land, and otherwise execute the trusts, and exercise the powers enumerated and conferred in the will, subject to the general regulations of the statute, and free from the control or intervention of a court;⁵ but where authority is not expressly given, or where, during the administration, he performs the ordinary offices of an executor, as where land is sold to pay the debts of decedent, no express power being given, he must first obtain authority or license from the probate court, and his sale must be reported to, and confirmed by, such court before a deed can lawfully issue to the purchaser. An executor's deed, therefore, will be governed

¹ Hosmer v. Campbell, 98 Ill. 572.

² Walker v. Craig, 18 Ill. 16; Van Wickle v. Calvin, 23 La. Ann. 205; Gilkey v. Hamilton, 22 Mich. 283.

³ Pitts v. Singleton, 44 Ala. 363.

⁴ Warfield v. Brand, 13 Bush (Ky.), 77; White v. Clover, 59 Ill. 462.

⁵ Buckingham v. Wesson, 54 Miss.

526; Whitman v. Fisher, 74 Ill. 147; Cronise v. Hardt, 47 Md. 433; Jelks v. Barrett, 52 Miss. 315; Hughes v. Washington, 72 Ill. 84. But the power must be explicit; general words do not confer power to sell lands. Skinner v. Wood, 76 N. C. 109.

by the law relating to trustees or administrators, according as he may convey in one or the other capacity, and the reader is referred to the remarks on those classes of deeds respectively.

Administrator with will annexed.—An administrator *with will annexed* occupies much the same position as an executor, and may exercise many of the executor's powers.¹ He acts under the will, and, as a rule, any power given to the executor which is not in the nature of a personal trust—that is, where the power given belongs to the office of executor and not to the person—may be exercised by an administrator with the will annexed.² Where the will constitutes a personal trust which the executor alone could execute without the intervention of a court or some statutory regulation, the trust will not pass to the administrator with the will annexed, and sales of real property of the testator by the administrator will be without authority and void.³ Where the will gives to an executor therein named powers and duties to be performed which do not ordinarily come within the scope of an executor's functions,⁴ or where land is devised to him to be sold,⁵ an administrator with the will annexed has no power, without the aid of a court, to sell the lands so devised or directed to be sold, or execute the powers given to the executor.⁶

¹ An administrator *cum testamento annexo* is appointed on the following occasions: 1. Where no executor is appointed by the will. 2. Where an executor is appointed but dies before the testator. 3. Where from any cause the executor becomes incompetent, disqualified or renounces the office. 4. Where the executor dies before the completion of administration; in this latter case the administrator is also administrator *de bonis non*.

² Anderson v. McGowan, 45 Ala.

462; Prescott v. Morse, 64 Me. 422; Belcher v. Branch, 11 R. I. 226.

³ Anderson v. McGowan, 45 Ala. 280; Dunning v. Ocean Nat. Bank, 61 N. Y. 497; Ross v. Barclay, 18 Pa. St. 179.

⁴ Ingle v. Jones, 9 Wall. 486.

⁵ Nicoll v. Scott, 99 Ill. 529; Dunning v. Ocean Nat. Bank, 61 N. Y. 497; Gilchrist v. Rea, 9 Paige, 66.

⁶ Such trusts frequently devolve upon a trustee whom the court may appoint for that purpose. Farwell v. Jacobs, 4 Mass. 634.

Trustees cannot become purchasers.—It is a settled principle of equity that no person who is placed in a situation of trust or confidence to the subject of the sale can be a purchaser of the property on his own account. The principle is not confined to a particular class of persons, such as guardians, trustees, etc., but is a rule of universal application to all persons coming within its principle, which is, that no party can be admitted to purchase an interest where he has a duty to perform that is inconsistent with the character of purchaser. The reason of the rule is, not because they might not, in many instances, make fair and honest disposition of it to themselves, but because the probability is so great that they would frequently do otherwise, without danger of detection, that the law considers it better policy to prohibit such purchases entirely than to assume them to be valid except where they can be proved to be fraudulent.¹

A trustee is not barred from ever becoming a purchaser of what had once been part of the trust estate. When the title of the trust estate has passed by a valid sale, in which the trustee has no interest, and all interest of the *cestui que trust* in it has ceased, the trustee becomes a stranger to the property, and may purchase it like any other stranger.

The principles which prohibit the trustee from becoming a purchaser extend to all sales of the trust property, whether made by the trustee himself under his powers as trustee, or under an adverse proceeding. As a general trustee of the subject it is his duty to make it bring as much as possible at any sale that may take place, and therefore he cannot put himself in a situation where it becomes his interest that the property should bring the least sum.²

¹ Cook v. Berlin Mill Co., 43 Wis. 433; Story's Eq., § 310; Grumley v. Webb, 44 Mo. 444; Blauvelt v. Ackermann, 20 N. J. Eq. 141; Railroad Co. v. Railroad Co., 19 Gratt. (Va.) 592; Boerum v. Schenck, 41 N. Y. 182; Roberts v. Roberts, 65 N. C. 27; McGowan v. McGowan, 48 Miss. 553; Goodwin v. Goodwin, 48 Ind. 584; Sheldon v. Rice, 30 Mich. 296.
² Martin v. Wyncoop, 12 Ind. 266.

Continued—Exceptions to and qualifications of the rule.—

The above remarks, though stating the generally received doctrine, are yet subject to many qualifications growing out of the statutes and their judicial interpretation, and while they still apply in all their pristine vigor to a large class of fiduciary relations, to certain others their effect has been greatly modified. Thus, a purchase of land by an executor, at his own sale, directly or indirectly, is not ordinarily void, but only voidable at the option of the heirs or beneficiaries seasonably expressed.¹ A clear and unequivocal affirmance of the sale, which must be *bona fide*, may conclude the beneficiary, if under no disability and in full knowledge of the facts, and the acceptance of proceeds by the beneficiary would, in general, amount to an affirmance.²

A marked exception to the rule is also made in favor of guardians *ad litem*. Unlike other guardians and ordinary trustees, a guardian *ad litem* has no authority or control over the person or property of the infant for whom he acts, and no right to receive or administer the proceeds of the minor's property which may be sold in the suit or proceeding in which he acts. If he has fairly advised the court of the infant's rights, and done all for him that the facts of the case required him to do, he may purchase and hold, in his own right, the property of the infant sold under an order of the court in the cause in which he was appointed, provided such purchase was in good faith, and for a full and valuable consideration paid by him.³

(b) Conveyances by Executive and Ministerial Officers.

Sources of authority.—The second class of fiduciary vendors comprises all persons who act under judicial or statutory authority, and whose deeds result from sales made in pursu-

¹ *Frazer v. Lee*, 42 Ala. 25; *Smith v. Granberry*, 39 Ga. 381; *Williams v. Rhodes*, 81 Ill. 571; *Froneberger v. Lewis*, 70 N. C. 456; *Dodge v. Stevens*, 94 N. Y. 209.

² *Boerum v. Schenck*, 41 N. Y. 182; *Brantley v. Cheeley*, 42 Ga. 209; *Scott v. Mann*, 33 Tex. 721.

³ *Marsh v. Marsh*, Am. Law Rec., Nov., 1875.

ance of some statutory direction, or the order of some tribunal of competent jurisdiction. The former are usually termed *execution* sales, the latter *judicial* sales.¹

Sales made under an execution must conform, in all respects, with the rules which the law lays down for the protection of the debtor. If not so made, they may be held irregular and void. But sales made under the decree of a court are, to a considerable extent, under the discretionary control of the court, which often sets them aside, although no error or irregularity has been committed, merely for the sake of an advance in the price; or which may, if satisfied that no injustice has been done, disregard irregularities in the conduct of the sale, and confirm the action of the master or other officer making same.²

Title under execution sale.—A purchaser at an execution sale succeeds to all the rights which the judgment debtor had,³ and takes the same title possessed by him with all its imperfections and infirmities.⁴ It is the policy of the law, however, to uphold and protect such titles; and though the deed purports to convey only “the right, title and interest” which the judgment debtor possessed or had in the land at date of the judgment, yet the purchaser under such a deed will take the entire title as against prior unrecorded deeds or equities of which he had no notice.⁵

¹ The chief differences between execution and judicial sales are: The former are based on a general judgment for so much money, the latter on an order to sell specific property; the former are conducted by an officer of the law in pursuance of the directions of a statute, the latter are made by the agent of a court in pursuance of the directions of the court; in the former the sheriff is the vendor, in the latter the court; in the former the sale is usually complete when the

property is struck off to the highest bidder, in the latter it must be reported to and approved by the court. Freeman, Void Jud. Sales, 14.

² Lasell v. Powell, 7 Coldw. (Tenn.) 277.

³ Morgan v. Bouse, 53 Mo. 219; Williams v. Amory, 16 Mass. 186.

⁴ Hicks v. Skinner, 71 N. C. 539; Cameron v. Logan, 8 Iowa, 434; Bassett v. Lockard, 60 Ill. 164.

⁵ Harpham v. Little, 59 Ill. 509.

The title so acquired may be sold and conveyed, even pending an appeal,¹ and the reversal of the judgment for error, where the court had jurisdiction of the subject-matter and the parties,² will not materially affect same; for it is a settled principle of the common law, coeval with its existence, that the defendant shall have restitution of the purchase-money, and the purchaser shall hold the property sold, except where the plaintiff in the judgment becomes purchaser, and still holds the title.³ In this latter event the title acquired under such judgment is divested by the reversal.⁴

Sheriff's deed — On execution.— A sheriff's deed made in pursuance of a sale on execution must be to the person to whom the certificate of purchase was issued or to his assignee, and if the deed is made to another, though it recites that he is the assignee of the certificate, it is a nullity if, in fact, the certificate was not assigned.⁵

To establish a title to land under a sheriff's sale on execution, all that is necessary to be shown, as a general rule, is a valid judgment, or, as has been held, a judgment by a court of competent jurisdiction, no matter if it be erroneous on its face,⁶ execution duly issued,⁷ and a sheriff's deed.⁸ But

¹ The issue of an execution on a judgment, pending an appeal, is irregular, but not void, and a sale of land under such an execution is subject to be set aside, on motion made in proper time by the defendant whose land has been sold; but no one except the defendant in the execution can question the sale for irregularity, however gross, and if not so set aside, the sale will pass the defendant's interest in the land. *Shirk v. Gravel Road Co.*, 110 Ill. 661.

² *Feaster v. Fleming*, 56 Ill. 457; *Hobson v. Ewan*, 62 Ill. 146.

³ *Fergus v. Woodworth*, 44 Ill. 374; *Mansfield v. Hoagland*, 46 Ill.

359. In this event the sale is usually void under special statutes. See *Hutchens v. Doe*, 3 Ind. 528. But compare *Gossom v. Donaldson*, 18 B. Mon. (Ky.) 230.

⁴ *Powell v. Rogers*, 105 Ill. 318.

⁵ *Carpenter v. Sherfy*, 71 Ill. 427. Compare *Bowman v. Davis*, 39 Iowa, 398.

⁶ *Mayo v. Foley*, 40 Cal. 281. And see *Den v. Taylor*, 16 N. J. L. 532.

⁷ *Fisher v. Eslaman*, 63 Ill. 78; *Den v. Despreaux*, 12 N. J. L. 182.

⁸ *Riddle v. Bush*, 27 Tex. 675; *Hughes v. Watt*, 26 Ark. 228; *Splahn v. Gillespie*, 48 Ind. 397; *Lenox v. Clark*, 52 Mo. 115.

in all cases the judgment is the foundation of the title,¹ and proof of same is indispensable to its validity.²

As the sheriff is only the executor of a naked power, it is necessary that the deed show substantial compliance with the terms creating the power as well as its proper execution; yet the recitals of a sheriff's deed are to be regarded only as inducement,³ and where the same substantially complies with the statutory requirements, it is not invalidated by ambiguous recitals or omissions which do not mislead.⁴ It is said that the statute requiring recitals in a sheriff's deed was not intended to make deeds void which do not contain them, but was only intended to make the recitals evidence of the facts recited; and when such recitals are full, they dispense with the necessity of introducing the judgment and execution in evidence. So far as such a statute requires recitals beyond what are necessary to show the authority of the officer to sell, it is merely directory;⁵ and where the deed discloses sufficient to show the authority to sell, even though the particular judgment and execution be not recited, so long as it appears to be by virtue of a judgment and execution, the sale and conveyance will be valid if, at the time of such sale, the sheriff had in his hands a valid execution.⁶ Defects of form are leniently regarded, and the instances are very rare in which a deed, issued in pursuance of an execution or chancery sale, is void for errors, defects or mistakes in form.⁷

Continued—Acknowledgment.—Unlike voluntary conveyances between individuals, it is essential to the validity of

¹ *Atkins v. Hinman*, 2 Gilm. (Ill.) 437; *Leland v. Wilson*, 34 Tex. 79; *Todd v. Philhour*, 24 N. J. L. 796. *Jordan v. Bradshaw*, 17 Ark. 106; *Holman v. Gill*, 107 Ill. 467.

² *Carbine v. Morris*, 92 Ill. 555.

³ *Leland v. Wilson*, 34 Tex. 79.

⁴ *Allen v. Sales*, 56 Mo. 28; *Jones v. Scott*, 71 N. C. 192; *Loomis v. Riley*, 24 Ill. 307; *Keith v. Keith*, 104 Ill. 397. *Clark v. Sawyer*, 48 Cal. 133. *Freeman*, Void Jud. Sales, § 45. The deed, however, must be what it purports to be; hence, a deed lacking a seal conveys no title. *Hinsdale v. Thornton*, 74 N. C. 167;

⁵ *Clark v. Sawyer*, 48 Cal. 133; *Kruse v. Wilson*, 79 Ill. 233.

a sheriff's deed, for land sold by him under an execution, that it should have been legally acknowledged. It is true that a sheriff's deed gives the vendor an inceptive interest in the land, but he has no right to enter, and no claim upon the property, as against the former owner, until after the deed is acknowledged. The property is conveyed against the will of the judgment debtor; the conveyance is not his act, but the act of the law; and the law, when acknowledgment is requisite, must be strictly complied with.¹ Where the acknowledgment is defective the deed is not aided by record.² Proof of official character is rarely necessary, however, for the law recognizes such officers as sheriffs and deputy sheriffs, and instruments executed by them in the course of their official duties are usually sufficient in themselves to prove that they were the officers, in fact and in law, which by their acts they profess to be.³

Continued — Operation and effect.—A sheriff's deed is *prima facie* evidence that the grantee holds all the title and interest in the land that was held by the judgment debtor at the time of the rendition of the judgment, and operates back, by relation, to the date of such rendition so as to extinguish all rights and equities in and to the premises derived from the judgment debtor in the meantime.⁴ And not only the entire interest of the judgment debtor passes by the deed, but also such covenants of title as run with the land.⁵ If made to a *bona fide* purchaser, and regular in itself, it is effectual as a conveyance, and cannot be impeached in any collateral proceeding for mere irregularity in any of the proceedings, judgment, execution or return.⁶

¹Ryan v. Carr, 49 Mo. 483; ⁴Shields v. Miller, 9 Kan. 390; Adams v. Buchanan, 49 Mo. 64. White v. Davis, 50 Mo. 333; Ferguson v. Miles, 3 Gilm. (Ill.) 358; Miller v. Wilson, 32 Md. 297; Kirk v. Vanberg, 34 Ill. 440.

But see, *contra*, Stephenson v. Thompson, 13 Ill. 186, where it is held that the deed may be proved by other evidence, and though unacknowledged it is still valid.

²Samuels v. Shelton, 48 Mo. 444.

³Ochoa v. Miller, 59 Tex. 460.

⁵Whiting v. Butler, 29 Mich. 122; White v. Whitney, 3 Met. 81; Leport v. Todd, 32 N. J. L. 124.

⁶Landets v. Brant, 10 How. 371;

It will operate against the judgment debtor by estoppel, and he will be precluded from setting up an outstanding title to avoid the sale by the sheriff, or to deny the title thereby acquired by the purchaser.¹

The recording of a sheriff's deed operates as constructive notice only to those who hold or claim under the judgment defendant; strangers, and those claiming under an independent or hostile title, are not affected thereby.²

Statutory sheriffs' deeds.— To overcome the effect of misrecitals, prevent collateral impeachment, and give the full desired effect of conveyances by the sheriff, the legislatures of a majority of the states have prescribed certain forms of official deeds and declared their legal effect. As in case of statutory forms of deeds between individuals, these conveyances contemplate but little verbiage, while the statute supplies what was formerly obtained by long and tedious recitals.

Judicial sales — Validity and effect.— A sale of land under a judgment or decree must be made in the manner and on the terms prescribed in such judgment or decree;³ and the confirmation by the court cannot, it seems, cure the invalidity of a sale not so made.⁴ But a sale will not be dis-

Draper v. Bryson, 17 Mo. 71; Maurior v. Coon, 16 Wis. 465.

¹Matney v. Graham, 59 Mo. 190; Reid v. Heasley, 2 B. Mon. (Ky.) 254; Jackson v. Bush, 10 Johns. 223; Jackson v. Hagaman, 1 Wend. 502; Gould v. Hendrickson, 6 Ill. 599. But see Kenyon v. Quinn, 41 Cal. 325, where it is held that a statutory provision to the effect that a conveyance of land in fee-simple shall convey the legal estate afterward acquired by the grantee has no application to a sheriff's deed made under execution sale.

²Gardner v. Jaques, 42 Iowa, 577.

³Langsdale v. Mills, 32 Ind. 380.

⁴Bethel v. Bethel, 6 Bush (Ky.), 65. But this will only apply to gross departures; mere irregularity is generally cured by confirmation. Williamson v. Berry, 8 How. 546; Koehler v. Ball, 2 Kan. 160. Void sales, whether execution or judicial, are classed by Mr. Freeman as (1) those which are void because the court had no authority to enter the judgment or order of sale; (2) those which, though based on a valid judgment or order of sale, are invalid from some vice in the subsequent proceedings. Freeman, Void Jud. Sales, 15.

turbed unless the party suing can show an injury resulting to him from the sale,¹ as well as an interest in the subject-matter,² while it is always the policy of the law to uphold judicial sales and to protect the rights of purchasers under them;³ and although the judgment or decree may be reversed, yet all rights acquired at a judicial sale while the decree or judgment was in force, and which it authorized, will be protected. It is sufficient for the buyer to know that the court had jurisdiction and exercised it, and that the order on the faith of which he purchased was made, and authorized the sale;⁴ for where the court has jurisdiction of the parties and of the subject-matter of the litigation, no matter how erroneously it may thereafter proceed, within the bounds of its jurisdiction its decree will be conclusive until reversed or annulled in some direct proceeding, and the title to property acquired at a sale under such decree, by a stranger to the record, will be upheld, although the decree itself may afterward be reversed for manifest error.⁵

Title under judicial sale.—The title acquired under a sale by order of the court differs in no material respect from that where the sheriff is the vendor. The purchaser is entitled to the interest of all the parties to the suit, and to the interest of those who have purchased *pendente lite* from any of the parties.⁶ He acquires no new rights, nor does the fact that the court is regarded as the vendor⁷ confer upon him any superior equities. A court of equity does not in-

¹ *Matter of Gilmer*, 21 La. An. 589.

² *Nixon v. Cobleigh*, 52 Ill. 387.

³ *Dorsey v. Kendall*, 8 Bush (Ky.), 294; *Allman v. Taylor*, 101 Ill. 185.

⁴ *Gray v. Brignardello*, 1 Wall. 627; *Fergus v. Woodworth*, 44 Ill. 374.

⁵ *Allman v. Taylor*, 101 Ill. 185.

⁶ *Harryman v. Starr*, 56 Md. 63.

⁷ In all sales made under the authority of a decree in equity, the court is the vendor, and the commissioner making the sale is the mere agent of the court. The decree is the warrant of authority to sell. *Parrat v. Neligh*, 7 Neb. 546; *Thompson v. Craighead*, 32 Ark. 291.

sure the title to real property sold under its decrees,¹ and the purchaser buys, presumably, with full knowledge of all defects and pre-existent liens;² he is bound to examine the title or purchase at his peril, and if he buys without an examination and obtains no title, he must, as a general rule, suffer the loss arising from his neglect, unless fraud or mistake has entered into the transaction.³ Prior to confirmation he has no independent rights, but is regarded as a mere proposer;⁴ after confirmation his rights become vested and the sale will not be set aside except for fraud, mistake, surprise or other cause for which equity would give relief if the sale had been made by the parties in interest instead of by the court.⁵

Neither will the title of an innocent purchaser, a stranger to the record, be affected by the subsequent reversal of the decree for irregularity;⁶ but where the purchaser was an original plaintiff in the suit, or an assignee of the judgment or decree, he acquires only a defeasible title, which may be defeated by a subsequent reversal, and the same rule obtains whether the reversal is based on an amendable defect or one that is incurable.⁷

Order of confirmation.—After the sale, and before the execution of a conveyance in all cases of judicial sales, and frequently of execution sales as well, a return or report of sale must first be made to the court which ordered the same, which upon examination approves and confirms the action of the officer who made the sale. Until this has been done the sale is incomplete, and confers no rights on the pur-

¹Gunton v. Zantzinger, 3 MacArthur (D. C.), 262.

²Housley v. Lindsay, 10 Heisk. (Tenn.) 651; Guynn v. McCauley, 32 Ark. 97; Capehart v. Dowery, 10 W. Va. 130; Watson v. Hoy, 28 Gratt. (Va.) 698.

³Tilley v. Bridges, 105 Ill. 336.

⁴State v. Roanoke Nav. Co., 86 N. C. 408.

⁵Berlin v. Melhorn, 75 Va. 639.

⁶Sutton v. Schonwald, 86 N. C. 198.

⁷McDonald v. Life Ins. Co., 65 Ala. 358; Fishback v. Weaver, 34 Ark. 569.

chaser.¹ In judicial sales a confirmation is rendered necessary from the fact that the court, and not the officer making the sale, is the vendor, and confirmation is regarded as the final consent; but even where there has been no confirmation, if a deed has been made and delivered, and there has been a possession and holding thereunder, time may, if sufficiently long, operate to confirm and ratify the sale and perfect the title of the purchaser.²

Sheriff's deed—Under decree.—Though a master, commissioner or referee is the medium through which a court of chancery ordinarily executes its decrees, the duty not infrequently devolves upon the sheriff either by virtue of his office or through special appointment. While acting under a decree he occupies the same position as a commissioner, and is but a ministerial officer of the court, to which he must make reports of his acts and by whom they must be confirmed before conveyances can be lawfully made.³

Master's, commissioner's and referee's deeds.—Where lands are sold by order of court, although the sheriff is a proper person to make the sale, the court has discretionary power to appoint a commissioner, master in chancery, or other officer of the court, or any fit and proper person to conduct same. In practice such sales are usually intrusted to a master or such corresponding officer as local procedure may indicate, who also executes the deed of conveyance.

Such deeds are without warranty or any terms except those imposed by law, and convey only such titles as the

¹ Busey v. Hardin, 2 B. Mon. (Ky.) 407; Bank v. Humphreys, 47 Ill. 227; Williamson v. Berry, 8 How. 547; 88 Ill. 357.

Thorn v. Ingram, 25 Ark. 52; Valle v. Fleming, 19 Mo. 454; Hunting v. Walter, 33 Md. 60. ² Gowan v. Jones, 18 Miss. 164. And see Rorer, Jud. and Ex. Sales, 57.

Approving the sale makes the officer's act that of the court, and where, upon such approval, he is ordered to make a ³ Taylor v. Gilpin, 3 Met. (Ky.) 544; Hunting v. Walker, 33 Md. 60.

defendants possessed. They take effect as conveyances in the same manner as deeds between individuals.

Administrators' deeds.—An administrator is regarded as an executive officer of the court, while he also occupies the relation of trustee to the estate, its creditors and distributees.¹ Although he may not possess as much power as an executor, the latter deriving his power from the testator and the law, and the administrator from the law only,² he yet possesses all necessary power to sell property, negotiate securities, and to settle and pay debts,³ but under the order and direction of the court. He takes neither an estate, title or interest in the lands of his intestate,⁴ but a mere naked power to sell for specific purposes.⁵ He takes the land as he finds it,⁶ and, having no interest therein, can maintain no action to perfect the title or relieve it of any burden,⁷ and must sell it as he finds it.⁸

An administrator's deed derives its primary validity from the order of the court directing the sale of the land in question.

The power to sell is a personal trust which cannot be delegated,⁹ and, the sale being a fiduciary act based upon statute, must show affirmatively a strict compliance with the law.¹⁰

¹ Wingate v. Pool, 25 Ill. 118; State v. Meagher, 44 Mo. 356.

² Gilkey v. Hamilton, 22 Mich. 283.

³ Walker v. Craig, 18 Ill. 116. Real estate cannot be sold by an administrator unless the personal estate is insufficient to pay the liabilities; and ordinarily, only so much should be sold as is necessary for that purpose. Newcomer v. Wallace, 30 Ind. 216; Foley v. McDonald, 46 Miss. 238.

⁴ Ryan v. Duncan, 88 Ill. 144; Stuart v. Allen, 16 Cal. 473.

⁵ Smith v. McConnel, 17 Ill. 135; Floyd v. Herring, 64 N. C. 409.

⁶ Gridley v. Watson, 53 Ill. 186.

⁷ Le Moyne v. Quimby, 70 Ill. 399; Ryan v. Duncan, 88 Ill. 146.

⁸ Martin v. Beasley, 49 Ind. 280.

⁹ Chambers v. Jones, 72 Ill. 275; Gridley v. Philips, 5 Kan. 349.

¹⁰ Fell v. Young, 63 Ill. 106; Lockwood v. Sturdevant, 6 Conn. 386; Corwin v. Merritt, 3 Barb. 341. An administrator's deed for land is not admissible as evidence without proof that the maker was administrator. Ury v. Houston, 36 Tex. 260.

The doctrine of *caveat emptor* applies to all sales by the administrator,¹ and the purchaser, who is presumed to have made all necessary inquiries, takes the title at his peril,² and subject to all liens, except those for the payment of which the land is sold.³ The purchaser has no right to the land until the sale has been confirmed;⁴ but where the sale has been made under a proper order of the court, and reported to and confirmed by it, it conveys title even though the proceedings be irregular.⁵

Guardians' deeds.—Guardians⁶ and conservators⁷ frequently make conveyances of the real estate of their wards, either to pay debts, or for the support and education of the ward, or for the purpose of investing the proceeds; and such conveyances, if attended by all the statutory requisites, are effectual to convey all the title which the ward may have possessed at the time of the sale.⁸ Such sales are made by the authority and under the direction of the probate court upon petition by the guardian stating the necessary jurisdictional facts,⁹ and after notice of such application in the manner provided by law.¹⁰ Such sales must be further re-

¹ *McConnell v. Smith*, 39 Ill. 279.

² *Bishop v. O'Connor*, 69 Ill. 431.

³ *Henderson v. Whiting*, 56 Ind. 131.

⁴ *Mason v. Osgood*, 64 N. C. 467; *Rawlings v. Bailey*, 15 Ill. 178; *Ury v. Houston*, 36 Tex. 260.

⁵ *Thorn v. Ingram*, 25 Ark. 52; *Myer v. McDougal*, 47 Ill. 278. Compare *Chase v. Ross*, 36 Wis. 267.

⁶ The common law recognized four kinds of guardians, to wit: in chivalry, by nature, in socage, and by nurture. The distinctions do not and never have existed in the United States. The statutory guardianship is the only kind which figures in land titles.

⁷ The estate, and frequently the person as well, of persons *non compos mentis* is often confided to the care of a statutory guardian, generally called a conservator or committee.

⁸ *Wisenor v. Lindsay*, 33 La. An. 1211; *Mulford v. Beveridge*, 78 Ill. 445; *Fitzgibbon v. Lake*, 29 Ill. 165.

⁹ The petition is of paramount necessity, and it seems that without such a petition the court gets no jurisdiction to grant a license to sell. *Ryder v. Flanders*, 30 Mich. 336.

¹⁰ The notice is jurisdictional, and a sale without giving the statutory notice has been held absolutely

ported to and confirmed by the court granting the license,¹ but the title of the ward will not be divested until a deed has been ordered and actually executed.²

void. Rankin v. Miller, 43 Iowa, 11; Kennedy v. Gaines, 51 Miss. 625. If, however, the notice is defective merely, the jurisdiction is saved. Lyon v. Vannatta, 35 Iowa, 521.

validity of the sale. People v. Circuit Judge, 19 Mich. 296; White v. Clawson, 79 Ind. 188; Chapin v. Curtenius, 15 Ill. 427.

² Doe v. Jackson, 51 Ala. 514.

¹ Confirmation is essential to the

CHAPTER VII.

TESTAMENTARY CONVEYANCES.

Generally considered.—The last mode of conveyance of real property is by *devise*, or disposition by last will and testament.¹ The word “devise” seems to be derived from divide, and originally meant any kind of division or distribution of property.²

It would seem that the power of devising lands existed in the time of the Saxons, but upon the establishment of the Normans it was suppressed as inconsistent with the principles of the feudal law, and the privilege of testamentary disposition was not restored until many years after the removal of restraints on alienation by deed.³ The power was indirectly acquired by means of the invention of uses, and the practice of devising the use of land eventually became quite common, but the enactment of the statute of uses effectually destroyed this power. The inconveniences which attended this restraint resulted, a few years afterward, in a partial liberty of disposition by will, and subsequently all restraints were removed.

The idea of a devise is thought to have been taken from the *testament* of the Roman law, which was at all times allowed in England with respect to personal property.⁴ But while the two methods are founded on different principles, and originally were governed by different rules, no distinction is now made between them, and all writings intended

¹ See p. 89, *ante*.

² Cruise, Dig., tit. 38, ch. I.

³ Spence, Eq. Jur. 20; 4 Kent, Com., lect. 68.

⁴ Cruise, Dig., tit. 38, ch. I. The word “testament” in the Roman

law was applied only to dispositions which contained an appointment or institution of an heir, who was to take all the property of the testator. See Sandars’ Justinian, 235; Morey’s Roman Law, 313.

for *post-mortem* operation are called *wills* and *testaments*, whether relating to real or personal property, or both.

The limits of this work preclude more than a casual glance at this very comprehensive subject, which will be accomplished by a brief consideration (1) of the making and revocation of wills; (2), their construction, operation and effect, and (3) the method and effect of their formal proof. The power to make wills, the manner of their execution, the method of their proof, and the effect that shall be given to them, depend largely upon the specific provisions of the statute, but these provisions are substantially the same in all of the states.

1. *Making and Revocation of Wills.*

Formal requisites.—Unlike deeds, which are drawn in conformity with legal or conventional precedents, wills may assume almost any shape. Modern wills, in many instances, and ancient wills uniformly, commence with a pious ejaculation, followed by a preamble dedicating the testator's soul to God, expressing the soundness of his mind, the health or debility of his body, and other particulars of no special importance which may, in all cases, be safely omitted. Immediately following is usually a direction of payments of debts and funeral expenses. This, too, is merely formal and immaterial, except that it may sometimes aid in the construction of a will by showing that the subject of his debts was brought distinctly to the testator's mind at the time of the execution of same.¹ Then come the bequests and devises, and finally the appointment of the executor.

With respect to the strictly formal parts a very simple and informal document will be sustained as a will, where the writing relied on has been executed in conformity to the statute, and shows upon its face a declaration by the testator that same is his will.² The essence of a will is, that

¹ 1 Redf. Wills, *674.

² 3 Wash. Real Prop. *681; Turner v. Scott, 51 Pa. St. 126; Burlington

University v. Barrett, 22 Iowa, 60; Wall v. Wall, 30 Miss. 91. Although an instrument be in the form of a

it is a disposition to take effect after death, and the form of the instrument, therefore, is immaterial if its substance is testamentary.¹

The statute usually requires the paper to be signed by the testator, but the signature may be original or by adoption,² and, as a rule, it must be attested by two or more subscribing witnesses, who, at the testator's request, affix their signatures in his presence.³

The residuary clause.—In a majority of wills there is inserted at the close a general devise of everything that the testator has not succeeded in disposing of in former parts of the will, which is called the *residuary clause*. Where the language of a residuary clause has sufficient scope and extent, evincing the intent of the testator to take up and carry into the residuary estate all of his estate remaining at his death undisposed of for any reason, the residuary clause will receive and pass a lapsed legacy and devise,⁴ as well as such as may fail for want of use of proper language to create the same, or to designate the devisee.⁵

But when the residuary clause does not by its own terms take in a lapsed legacy or devise, so as to disclose the intent of the testator to pass the lapsed estate into the residue, the rule is different.⁶

Void and illegal legacies or devises come under the rule

deed, and called such, still if its purpose be testamentary, and it is only to be consummated by the death of the maker, effect will be given to it as a will and not as a deed. *Gillham v. Mustin*, 42 Ala. 365.

¹ *Wilson's Ex'rs v. Van Leer*, 103 Pa. St. 600.

² A mark has been held a good signature even when the statute uses the word *subscribed*. *Van Honswyck v. Wiese*, 44 Barb. 494; *Jackson v. Jackson*, 39 N. Y. 153.

³ Consult *Hopper's Will*, 1 Tuck. (N. Y. Sur.) 378; *Lawrence's Will*, id. 243; *Holloway v. Galloway*, 51 Ill. 159.

⁴ *Youngs v. Youngs*, 45 N. Y. 254; *Patterson v. Swallow*, 8 Wr. (Pa.) 490; *Hillis v. Hillis*, 16 Hun (N. Y.), 76. Local statutes will sometimes materially affect the doctrine stated in the text.

⁵ *Lovering v. Allen*, 129 Mass. 97.

⁶ *Yard v. Murry*, 86 Pa. St. 113.

first above stated,¹ and generally, unless a contrary intention is manifested, the residuum will take and pass everything of the nature above indicated.²

A different rule, however, applies to the residue itself; for if a gift of the residue, or any part of it, fails, whether by lapse, illegality or revocation, to the extent that it fails the will is inoperative, and the subject of the gift passes to the next of kin according to the statute of descents.³

Codicils.—A *codicil* is defined as some addition to, or qualification of, a last will and testament.⁴ Where it is in irreconcilable conflict with the will, it must prevail as a revocation, since it is the last expression of the testator's intent in the disposition of his property.⁵ Ordinarily, however, a codicil imports not a revocation, but an addition to, or explanation or alteration of, the will, in reference to some particular, and assumes that in all other particulars it is to be in full force and effect.

The authorities fully establish the proposition that a codicil which does not in terms revoke a clause in the will, but modifies it in some of its features entirely consistent with the retention of its other provisions, will be allowed to have that partial effect, and the clause thus changed will remain as the embodiment and expression of the testator's intent; while if duly executed with all the formalities required by law, it will operate to confirm and republish the rest of the will,⁶ unless the testator declares that he does not intend

¹ Burnet v. Burnet, 30 N. J. Eq. 595. A distinction is made in some states between legacies and devises: the legacy falling into the residuum; the lapsed devise descending to the heirs. See Orrick v. Boehm, 49 Md. 2.

² Thayer v. Wellington, 9 Allen (Mass.), 283. The residuary clause will carry the estate devised in a clause which the testator has re-

voked by striking it out of his will. Biglow v. Gillott, 123 Mass. 102.

³ Burnet v. Burnet, 30 N. J. Eq. 595.

⁴ 1 Bouv. Law Dict. 285.

⁵ Hallyburton v. Carson, 15 Reporter, 154.

⁶ O'Hara on Wills, 6; Brown v. Clark, 77 N. Y. 369; Van Cortlandt v. Kip, 1 Hill, 590; Mooers v. White, 6 Johns. Ch. 375; 1 Jarm. on Wills, 78.

that it shall have that effect.¹ It will thus be seen that the codicil plays a most important part both in the disposition of the property and in the matter of validating that which has preceded it, and which, by reason of defective execution or other circumstances, has become inoperative.²

It is an established rule not to disturb the dispositions of the will further than is absolutely necessary to give effect to the codicil,³ and the intent of the testator is always sought to give effect to both instruments when they can operate in perfect harmony.⁴ But where the absolute and unqualified gift in the codicil is incompatible with the disposition of the land made in the will, and must have a revoking efficacy or be itself nugatory, the will must yield to the codicil.⁵

A codicil depending upon the body of the will for interpretation or execution cannot be established as an independent will, when the will itself has been revoked.⁶

Revocation.—As a will takes effect, or becomes operative, only after the death of the maker, it follows that it may be altered or abrogated by him at any time during his life. This latter act is called *revocation*. At one time it would seem that wills might be revoked by spoken words only, but this was prevented by the statute of frauds, the substantial features of which have been re-enacted in all of the United States, and the rule now is that a will cannot be invalidated by the parol declarations of the maker, made either before or after its execution.⁷

As a general rule a will can only be revoked (1) by a subsequent will; (2) by a codicil; (3) by destroying, canceling or obliterating, or (4) by a change in the domestic condition of testator.⁸

¹ Van Cortlandt v. Kip, 1 Hill, 590. Mass. 232; Vaughan v. Bunch, 53

² See Wms. on Executors, 97; 1 Miss. 513.
Jarm. on Wills, 78.

⁶ Youse v. Forman, 5 Bush (Ky.), 337.

³ Jarm. on Wills, 343, note.

⁴ Hallyburton v. Carson, 15 Reporter, 154.

⁷ See Dickie v. Carter, 42 Ill. 376.

⁵ Wainwright v. Tuckerman, 120

⁸ This matter is statutory, but the text states the statutory rule. See Stat. 29 Car. II, ch. 3, § 6.

It was formerly held that a subsequent will only operated as a revocation where it contained an express clause revoking all former wills or made a different and incompatible disposition of the lands devised by a former one.¹ This rule, while it has, in the main, been followed by American courts, is subject to some modification dependent upon disclosed intent, and usually a subsequent instrument, duly executed as a last will, and which is complete in itself and adequate for the disposition of testator's entire estate, will be construed as revoking all former wills, although no words to that effect are used.² Prudence would suggest, however, that in the draughting of wills a revocation of all former wills be expressly declared.

A codicil may have effect as a revocation either in whole or in part of the will to which it is annexed. See remarks under that head.

A will may be revoked by "burning, canceling, tearing or obliterating the same,"³ if done with intent to revoke⁴—*animo revocandi*; but this effect will not be given to such acts when they result from accident or mistake.⁵

Marriage and birth of issue is by statute generally sufficient to work a revocation of a prior will, and apart from the statute subsequent marriage has been held to revoke a will where it contained no provisions showing a contemplation of the relations growing out of marriage.⁶

2. Operation and Effect of Wills.

Rules of construction.—Upon the ground that wills are often made in haste, and by inexperienced persons, a devise is not construed strictly and technically, like a deed, but

¹ See Cruise, Dig., tit. 38, ch. VI.

⁵ Wolf v. Bollinger, 62 Ill. 368;

² Clarke v. Ransom, 50 Cal. 595;

Dawson v. Smith, 3 Houst. (Del.) 335.

Re Fisher, 4 Wis. 254; Simmons v.

Simmons, 26 Barb. (N. Y.) 68. And see Redf. Wills, ch. VII.

⁶ See Board of Missions v. Nelson, 72 Ill. 564; Brush v. Wilkins, 4 Johns. Ch. (N. Y.) 506; Warner v.

³ Stat. of Frauds, 29 Car. II.

⁴ Avery v. Pixley, 4 Mass. 460;

Beach, 4 Gray (Mass.), 162.

Dan v. Brown, 4 Cow. (N. Y.) 490.

liberally, and according to the intent of the testator, and such intent may be gathered, in case of doubt, not from detached clauses, but from the whole will, so that every word may have its effect, if possible.¹ It is a cardinal rule, however, in the construction of wills, that a testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context it appears that he has used them in a different sense; in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed,² and technical words are presumed to be used in their legal sense, unless there is a plain intent to the contrary.³

The general intent will prevail over expressions indicating a different particular intent,⁴ though every expressed particular intent must be carried out when it can be;⁵ and when a will is susceptible of a twofold construction, one of which avoids and the other upholds it, the latter must be adopted.⁶ The general rule, however, that wills are to be construed according to the intention of the testator must be understood as the intention of the testator as expressed in the will; and this must be judged of exclusively by the words of the instrument as applied to the subject-matter and the surrounding circumstances,⁷ and not from extrinsic matter or evidence *aliunde*.⁸

¹ Welch v. Huse, 49 Cal. 507; Butler v. Huestis, 68 Ill. 594; Lytle v. Beveridge, 58 N. Y. 592; Moran v. Dillehay, 8 Bush, 434; Bergan v. Cahill, 55 Ill. 160.

² Luce v. Dunham, 69 N. Y. 36; Edwards v. Bibb, 43 Ala. 666; Mead v. Jennings, 46 Mo. 91; Feltman v. Butts, 8 Bush (Ky.), 115. Words may be considered in an order other than that in which they are placed, if the intent of the testator is better served thus. Ferry's Appeal, 102 Pa. St. 207.

³ Butler v. Huestis, 68 Ill. 594; France's Estate, 75 Pa. St. 220; DeKay v. Irving, 5 Den. 646.

⁴ Bell v. Humphrey, 8 W. Va. 1; Parks v. Parks, 9 Paige, 107; Schott's Estate, 78 Pa. St. 40; Watson v. Blackwood, 50 Miss. 15.

⁵ Bell v. Humphrey, 8 W. Va. 1.

⁶ Mason v. Jones, 2 Barb. 229.

⁷ Bell v. Humphrey, 8 W. Va. 1; Wheeler v. Hartshorn, 40 Wis. 83; Blanchard v. Maynard, 103 Ill. 60.

⁸ McAlister v. Butterfield, 31 Ind. 25; Brownfield v. Wilson, 78 Ill.

These are the basic principles that govern the construction of wills, and to them little can be added that is of general application. The donor of property by testamentary disposition has an almost unlimited scope within which to exercise his judgment or to gratify his caprice, and while multitudes of wills are daily presented for construction, it is seldom that we find any two of them exactly similar. Unlike deeds of conveyance in this respect, they are as multifarious and distinct in their structure, phraseology and purposes as are the mental operations, motives and feelings of the different testators. The intention must, in all cases, be sought for, and if possible ascertained; and this intention, when it is not in conflict with the settled policy of law, will always be respected and allowed to operate.¹ Any construction which will result in partial intestacy is to be avoided, unless the language of the will compels it.²

Repugnancy.—It is a well-established rule that where two or more provisions in a will are clearly repugnant or irreconcilable the latest should prevail,³ as being indicative of

467; *Caldwell v. Caldwell*, 7 Bush (Ky.), 515; *Sherwood v. Sherwood*, 45 Wis. 357. It is true that the condition of the testator at the time of execution, the state of his property, his family, and the like, may be shown in order to throw light upon his intention; yet as the writing is the only outward and visible expression of his meaning, no other words, as a rule, can be added to or substituted for those used. *Hunt v. White*, 24 Tex. 643; *Mackie v. Story*, 93 U. S. 589; *Abercrombie v. Abercrombie*, 27 Ala. 489; *Herrick v. Stover*, 5 Wend. (N. Y.) 580. See, however, the succeeding section on "repugnancy."

¹ *Douglass v. Blackford*, 7 Md. 22.

² *Vernon v. Vernon*, 53 N. Y. 351; *Cate v. Cranor*, 30 Ind. 292. The state of the law at the time of the execution of a will often affords material assistance in arriving at the intention of the testator, when it would otherwise be doubtful; but the rights of parties taking under the will are always to be determined by the law as it existed at the time the will took effect. *Carpenter v. Browning*, 98 Ill. 282.

³ *Hamlin v. Express Co.*, 107 Ill. 443; *Fulton v. Hill*, 41 Ga. 554; *Bradstreet v. Clarke*, 12 Wend. (N. Y.) 602; *Van Nostrand v. Moore*, 52 N. Y. 12; *Evans v. Hudson*, 6 Ind. 293; *Miller v. Flournoy*, 26 Ala. 724; *Pickering v. Langdon*, 23 Me. 430.

the testator's latest wish;¹ yet it is a rule that is only applied in cases of absolute necessity, as where the provisions are totally inconsistent with each other, and the real intention of the testator is incapable of determination.² A prior provision, however, will never be disturbed, further than is absolutely necessary to give effect to a subsequent one;³ nor will the expression of a particular intent be sufficient to overcome the manifest general intent.⁴ Thus, where the first clause absolutely disposes of all testator's property, a subsequent clause providing for the distribution of a fund which would or might at some future time accrue to his estate would not affect the antecedent general disposition, for in such case, no residuum being contemplated, there could be no residuary legatees.⁵ Similarly, where there is a devise of an unlimited power of disposition of an estate in such manner as the devisee may think proper, a limitation over is inoperative and void, by reason of its repugnancy to the principal devise.⁶

Under the application of the rule that a will should be so construed as to effectuate the intention of the testator as far as possible, express words must sometimes yield to the otherwise manifest intention, and words will even be added where it is absolutely necessary to avoid absurdity or give effect to such manifest intention.⁷

Devises to heirs — Effect of.— It is a rule of the common law that where devisees under a will would take the same estate in quantity and quality which they would take from

¹ Rountree v. Talbot, 89 Ill. 246.

⁴ Hamlin v. Express Co., 107 Ill.

² Covenhoven v. Shuler, 2 Paige (N. Y.), 122; Oxley v. Lane, 35 N. Y. 340; Newbold v. Boone, 52 Pa. St. 167; Bartell v. King, 12 Mass. 542; Thrasher v. Ingram, 32 Ala. 645; Siceloff v. Redman, 26 Ind. 251.

443; Bell v. Humphrey, 8 W. Va. 1; Cook v. Holmes, 11 Mass. 528; Pickering v. Langdon, 22 Me. 413; Schott's Estate, 78 Pa. St. 40; Watson v. Blackwood, 50 Miss. 15; Miller v. Flournoy, 26 Ala. 724.

³ Taggart v. Murray, 53 N. Y. 233; Kenzie v. Roleson, 28 Ark. 102; Parker v. Parker, 13 Ohio St. 95; Stickle's Appeal, 29 Pa. St. 234.

⁵ Henning v. Varner, 34 Md. 102.

⁶ Hamlin v. Express Co., 107 Ill. 443.

⁷ Welsch v. Savings Bank, 94 Ill.

an intestate ancestor by operation of law, the title so derived is held by descent and not by purchase, and this rule may still obtain in some of the states.¹ But when one devises property to his heirs it is but fair to presume he intended they should take the property under the will, and in furtherance of this principle the rule first stated has been set aside in a majority of the American states, and the devisees in such cases held to take by purchase and not by descent.² Where, however, the gifts to the heirs at law are made to them *simpliciter*, the persons to take and the proportions must be determined by the statutes of descents and distribution.³

Words of grant.—As in deeds so in wills, there must be apt words of grant or conveyance or words indicative of testamentary intent, but any form of expression will be sufficient to pass the title, provided the intent is manifest. “Give,” “devise” or “bequeath” are the words commonly in use, and all or either will be sufficient to pass real estate, though the technical word for this purpose in a properly drawn will is “devise.”⁴ Words of advice, desire, recommendation, etc., are not ordinarily sufficient.⁵

191; *Wright v. Dunn*, 10 Wheat. 204; *Bartlett v. King*, 12 Mass. 537; *Ruston v. Ruston*, 2 Dall. 244.

¹ *Donnelly v. Turner*, 15 Reporter, 717. This seems to have been the view which formerly obtained in this country. Mr. Hilliard says: “A devise is void if made to the heir at law, and if it gives him the same estate which he would have inherited. In such case the heir takes by descent, which is a better title than that of a devisee; because an adverse claimant may enter upon the latter, but not upon an heir.” 2 Hill. Abridg. 514. But this doctrine is not now recognized.

² *Gilpin v. Hollingsworth*, 3 Md.

190. When heirs take by purchase they do not take as heirs, but as a class of persons to whom by that means the testator has selected to devise his property; and as they take in their own right, the distribution is to be made *per capita* and not *per stirpes*. *Campbell v. Wiggins*, 1 Rice’s Ch. (S. C.) 10. And see *Robinson v. Le Grand*, 65 Ala. 111.

³ *Richards v. Miller*, 62 Ill. 417.

⁴ Acceptance of a devise, where it is beneficial to the devisee and attended with no charge or risk, is always presumed. *Brown v. Thorndike*, 15 Pick. 388.

⁵ *Gilbert v. Chapin*, 19 Conn. 342; *Bohn v. Barret’s Ex’r*, 11 Reporter, 839.

Words of purchase and limitation.—The words used in connection with gifts to specific persons to show, as in case of deeds, the nature or quality of the estate conveyed, are usually “heirs,” “heirs of the body,” “issue,” etc., and accordingly as the words are used may be either words of purchase or of limitation. The word “issue” presents the largest number of questions and has been productive of an almost innumerable number of decisions. As a word of limitation it is collective, and signifies all the descendants in all generations; but as a word of purchase it denotes the particular person or class of persons to take under the devise. The term may be employed in either manner, as will best effectuate the testator’s intention, and is the most flexible word that can be used.¹ Courts more readily interpret the word “issue” as the synonym for “children,” and as a mere description of the person or persons to take, than they do the words “heirs” or “heirs of the body.”²

The usual and ordinary words for conveying a fee-simple, in wills as well as in deeds, are “heirs,” or “heirs and assigns forever;” but a devise to a man “forever,” or to one “and his assigns forever,” or to one in “fee-simple,” will pass an estate of inheritance to the devisee, notwithstanding the omission of the legal words of inheritance,³ while the statute in a majority of the states will cover the deficiency and give to the devisee an estate in fee, none other being mentioned.⁴

¹ *Timanus v. Dugan*, 46 Md. 402; *Daniel v. Whartenby*, 17 Wall. 639. clearly appears. 2 *Jarm. on Wills*, 328.

Words in the introductory or other parts of a will indicating an intention of the testator to dispose of this whole estate, although not conclusive that he intends to pass a fee, always favor such construction. *Geyer v. Wentzel*, 68 Pa. St. 84; *Fearing v. Swift*, 97 Mass. 413. ³ *Coke*, Lit. 9 b; 2 *Black. Com.* 108; *Meyers v. Anderson*, 1 *Strobh. Eq. (S. C.)* 344; *Timanus v. Dugan*, 46 Md. 402; *Tatum v. McClellan*, 50 Miss. 1; *Wetter v. Walker*, 62 Ga. 142; *Edwards v. Barnard*, 84 Pa. St. 184.

² In England the word “issue” is a word of limitation and not of purchase, unless the contrary statute very generally enacted. ⁴ *Leiter v. Sheppard*, 85 Ill. 243; *McConnell v. Smith*, 23 Ill. 617; *Mirfitt v. Jessop*, 94 Ill. 158.

Questions as to whether a devisee takes the fee or a lesser estate occur most frequently where the testator, in his anxiety to make his gift effective, makes several bequests in the alternative, or limits one estate upon another, and are usually to be decided by the application of the rule in Shelly's case as modified by local law. No rule of general application can be formulated, and from a review of the reported cases on this subject one can well appreciate the remark of a learned writer, that "the liberality of the law in construing wills has opened the flood-gates of legal chaos."¹

It would seem, however, that whenever the intention of the testator can be ascertained it will overcome all technical rules;² and this intention turns, not upon the quantity of interest given to the first taker or person specified, but upon the nature of the estate intended to be given to the "heirs."³

The rule in Shelly's case.—Though entailed estates are no longer permitted in any of these United States, the rule in Shelly's case still has a modified force in all, and is often invoked in the construction of devises to determine the operation of the will and settle conflicting claims. This rule

throughout the Union provides, substantially, that every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee-simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law.

¹ O'Hara on Wills, 27. And see Clark v. Boorman's Ex'rs, 18 Wall. 493.

² Goodrich v. Lambert, 10 Conn. 448; Baker v. Scott, 62 Ill. 90; Butler v. Huestis, 68 Ill. 601. The de-

cisions of the local courts will furnish the best guide for construing estates under wills, as, between the states, diametrically opposed views will frequently be met with on the same admitted facts.

³ Baker v. Scott, 62 Ill. 90; 4 Kent, Com. 221. The rule in Shelly's case, that is, the technical application of the words "heir" and "heirs," is not now received in all its original vigor, from the fact that it often operates to defeat the testator's intention, and in the United States it is regarded of no especial force except as an aid to construction and intention. Blake v. Stone, 27 Vt. 475.

provides that, where the ancestor takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, either in fee or in tail, the term "heirs" is a word of limitation and not of purchase;¹ and when applied to wills is ordinarily confined to cases in which the remainder is limited in terms to the "heirs"² and not to "children" or "issue."³ When invoked, as a rule it is not a real exception to the fundamental doctrine that the intention of the testator must guide in interpreting a will; it sacrifices a particular intent to a general intent. It does not interpret a will, but takes effect when the interpretation has been ascertained.⁴

Interpretation of particular words and phrases.—Though the testator is presumed to use technical words according to

¹ Baker v. Scott, 62 Ill. 90; Estate of Utz, 43 Cal. 200.

² A devise of an estate to a daughter, to be so secured to her that she shall enjoy it during her life, and after her decease to go to her heirs forever, will, under the rule in Shelly's case, give her an estate in fee-simple. Wicker v. Ray, 118 Ill. 472.

³ Akers v. Akers, 23 N. J. Eq. 26; Estate of Utz, 43 Cal. 200. But see Haley v. Boston, 108 Mass. 576. The word "children" in its usual sense is a word of purchase and not of limitation, and is always to be so regarded unless the testator has unmistakably used it otherwise (Stump v. Jordan, 54 Md. 631; 2 Wash. Real Prop. (4th ed.) 603); while not infrequently the word "heirs," or even the words "heirs and assigns forever," are held not to operate as words of limitation because corrected or explained by words which follow and which are

irreconcilable with the notion of descent. Shreve's Case, 43 Md. 399.

⁴ Yarnall's Appeal, 70 Pa. St. 335. Greater latitude, however, is given in the construction of wills than in that of deeds, and courts will look to the whole will. Thus, the rule as stated in the text, while of general controlling efficacy in deeds, where it may usually be safely applied, is subject to a wide latitude in wills; and while in some states it may be rigidly enforced, in the majority, when explanatory words are found in the will showing the intention of the testator that the words "heirs" or "heirs of the body" are employed to show that such persons shall take under the devise as a description of persons, they will be treated as words of purchase and not of limitation. Butler v. Huestis, 68 Ill. 594. When such appears to be the testator's intention, "heirs" has been construed to mean "children."

their technical meaning,¹ this can hardly be asserted as a rule; or, should it be so asserted, it must be taken subject to that other all-powerful rule that the intention of the testator must prevail.² The construction of words in a will is much less technical than that of the same words in a deed; for though in deeds effect will always be given to the true intention of the parties,³ yet the words employed govern such intention, while in a will they are in all respects alike. Where the same precise form of expression occurs as may have been the subject of some former adjudication, unaffected by any indication of a different intention in other parts of the instrument, the courts, with a view to certainty and stability of titles, will follow the precedent; yet the cardinal canon still holds good, that the intention of the testator of each will separately is to be gathered from its own four corners,⁴ and where the intention satisfactorily appears it should prevail over any artificial rule of construction.⁵

Words which pass real estate.— Sometimes wills contain no specific allusions to land, or particular bequests may be made in general terms, and in such cases grave questions of construction arise when real estate is claimed under them. The liberality of courts is nowhere more manifest than in the solution of these questions. The words “property” and “estate,” when used in a general sense, are always held sufficient to embrace all the testator’s property, real as well as personal;⁶ but when coupled with directions applicable only

¹ France’s Estate, 75 Pa. St. 220.

² Smyth v. Taylor, 21 Ill. 296; Heuser v. Harris, 42 Ill. 425; Meade v. Jennings, 46 Mo. 91.

³ Peckham v. Haddock, 36 Ill. 38; Churchill v. Reamer, 8 Bush (Ky.), 256.

⁴ Provenchere’s Appeal, 67 Pa. St. 463.

⁵ Kennedy v. Kennedy, 105 Ill. 350.

⁶ Fogg v. Clark, 1 N. H. 163;

Jackson v. Housel, 17 Johns. 281; Wheaton v. Andress, 23 Wend. 452; Hunt v. Hunt, 4 Gray (Mass.), 190; Korn v. Cutler, 26 Conn. 4; Monroe v. Jones, 8 R. I. 526. This is directly contrary to the earlier and more technical rule, which confined these words entirely to personalty unless there was something in the context to show that

to personalty they will not have this effect, nor where subsequent particulars clearly indicate that the testator had only personalty in contemplation.¹ The word "effects," though savoring strongly of personalty,² may, when the context clearly shows the intention, as when used in connection with the word "real,"³ be sufficient to pass land.⁴ "Goods," according to its natural grammatical and ordinary meaning, does not include lands. General usage has given it a meaning as consisting of personalty only, and this is its primary legal signification.⁵ The context may sometimes enlarge this meaning; and where it satisfactorily appears that the testator intended to use the word in a different and more comprehensive sense, so as to embrace real estate, courts will give effect to that intent. The phrase, "all my worldly goods," if used without specific enumeration, may reasonably be supposed to embrace lands, and in some instances has been so construed; but if attempt is made at designation, the restricted meaning implied from such designation will prevail.⁶

The question will occur most frequently in constructions of the bequest of the residuum, and courts seem inclined to favor any construction which will avoid even a partial intestacy.⁷

Yet while no particular words are necessary to pass real estate, enough must appear to evidence the intention to convey, and words cannot be supplied to meet the deficiency, even though they may have been omitted by what might

the testator intended a more enlarged meaning.

¹ *Smith v. Hutchinson*, 51 Mo. 83.

² Indeed, this term when used in a will is generally construed to refer to personalty only, unless there is something in the context to require a more extended application.

³ As, "all my effects, real and personal."

⁴ *Paige v. Foust*, 89 N. C. 447.

⁵ *Farish v. Cook*, 78 Mo. 212.

⁶ As where testator bequeaths "all my worldly goods, consisting of," etc., the enumeration describing only personalty, real estate not specifically mentioned or otherwise referred to will not pass.

⁷ *Vernon v. Vernon*, 53 N. Y. 351; *Cate v. Cranor*, 30 Ind. 292; *Damom v. Bibben*, 135 Mass. 458.

seem to be palpable error;¹ and where specific mention is made of certain property, other property not alluded to or covered by general terms will not pass.²

Limitations and remainders.—Nine-tenths of all the litigation concerning testamentary conveyances is occasioned by questions relative to the construction of limitations and remainders. The subject has been incidentally discussed in several of the preceding paragraphs, and in addition to what has been there said little can be stated without entering into the matter at greater length than the exigencies of this work will permit. Local statutes are very effective in the settlement of such questions, so far as the validity of the remainder limited is concerned, as well as the persons who take, when particular words are accorded a statutory definition.

All words of purchase, as “children,”³ “issue,” etc., create remainders according to their import, while “heirs,” when construed as a word of purchase, designates not only the persons who are to take, but also the manner and proportions in which they take.⁴ The utmost liberality is displayed in the reported decisions construing remainders, and the circumstance that the first taker has it in his power to dispose of the whole estate, and thus defeat a limitation over, is not of itself conclusive that the expectant estate is void, when a contrary intention appears from the will.⁵

The intention of the testator must, in all cases, be carried

¹As where testator, after making certain bequests and devises, gave “all the rest of my estate — *personal*” to his four sons, and in a codicil stated that he had disposed of his “estate, *real and personal*,” to said sons, and revoked the share left to a certain son, *held*, that the court could not supply the words “real and” before “personal” in the will, and that testator died intestate as to his real estate, except a portion by another

clause specifically devised. *Graham v. Graham*, 23 W. Va. 36.

²*Farish v. Cook*, 78 Mo. 212.

³*Beacroft v. Strawn*, 67 Ill. 28.

⁴*Rand v. Sanger*, 115 Mass. 124. The rules of descent, in such case, are presumed to be the intended guide.

⁵*Terry v. Wiggins*, 2 Lans. (N. Y.) 272; *Burleigh v. Clough*, 52 N. H. 267. Compare *Clark v. Tennison*, 23 Md. 85.

out, when such intention can be ascertained from the will, and in no case can the intention thus ascertained be defeated by a technical construction of the language employed.¹ Limitations to survivors have produced a vast amount of litigation, but the questions arising under such a devise may now be considered as well settled, and the general rule seems to be that the word "survivor" is to be taken in its natural and literal import, unless the context plainly indicates a different intention, and should not be construed as equivalent to the word "other."² Where the courts have given the word "survivor" the force of "other," it has been done to avoid some consequence which it was very certain the testator could not have intended.³

Devise to a class.—It is a rule of the common law that a devise to a class of persons takes effect in favor of those who constitute the class at the death of the testator, but this rule has been greatly modified in nearly every state, so that when an estate is devised to the children or other relatives of the testator, the lineal descendants of a devisee who dies before the testator take the share of their ancestor.⁴

Gift of the income of realty.—It is a well-settled rule of law that a gift of the income of real estate, or of the "rents and profits" or "benefits," is a gift of the real estate itself. Those to whom the testator has given the income for life will take a life estate, and those to whom he has given the perpetual income will take a fee-simple estate.⁵ Such gift, however, to accomplish this purpose must be without quali-

¹ Terry v. Wiggins, 2 Lans. (N. Y.) 272.

² This is the construction which now obtains both in England and the United States. 2 Jarm. on Wills, 648; 2 Redf. on Wills, *372.

³ Leeming v. Sherratt, 2 Hare (Eng.), 14; 2 Jarm. on Wills, 658. Consult Passmore's Appeal, 23 Pa. St. 381; Moore v. Lyons, 25 Wend.

119; Martin v. Kirby, 11 Gratt. (Va.) 67.

⁴ Jamieson v. Hay, 46 Mo. 546; Smiley v. Bailey, 59 Barb. 80.

⁵ Reed v. Reed, 9 Mass. 372; Butterfield v. Haskins, 33 Me. 392; Earl v. Rowe, 35 Me. 414; Collier v. Grimsey, 36 Ohio St. 17; Drusadow v. Wilde, 63 Pa. St. 170; Morgan v. Pope, 7 Coldw. (Tenn.) 541.

fication or limitation, and in order to determine whether there is such qualification or limitation recourse must be had to the whole will, with the view of ascertaining the sense in which the terms were used by the testator. When it appears from other parts of the will that the fee is otherwise disposed of, such terms cannot be held to carry the fee.¹

Devise with power of disposition.—Where an estate is given to a person generally or indefinitely, with a power of disposition, it carries the fee, unless the testator gives to the first taker an estate for life only, and annexes a power of disposition of the reversion. In that case the express limitation for life will control the operation of the power, and prevent it from enlarging the estate to a fee. This is the doctrine laid down by Kent² and the English writers,³ and substantially followed by later American decisions.⁴ The question often arises where life estates are created by implication, as where the testator devises property generally, without a specification of the quantity of interest, and adds some power of disposition with a remainder or limitation over. In such case, where an absolute power of disposition is annexed to the gift, a limitation over is of no effect;⁵ but where the power of disposal is not an absolute power, but a qualified one, conditioned upon some certain event or purpose, and there is a remainder or devise over, the words last used restrict and limit the words first used, and reduce what was apparently an estate in fee to an estate for life only.⁶ Where

¹ Collier v. Grimsey, 36 Ohio St. 17; Morgan v. Pope, 7 Coldw. (Tenn.) 541.

² 4 Kent, Com. *535.

³ Cruise, Dig., tit. 38, ch. 13, § 5; Jarm. on Wills (Bigelow), *873.

⁴ Ramsdell v. Ramsdell, 21 Me. 288; Jones v. Bacon, 68 Me. 34; Smith v. Bell, 6 Pet. 68; Gifford v. Choate, 100 Mass. 346; Burleigh

v. Clough, 52 N. H. 267; Jackson v. Robbins, 16 Johns. 537; Ayer v. Ayer, 128 Mass. 575; Downey v. Borden, 36 N. J. L. 460; Benker v. Jacoby, 36 Iowa, 273; Hamlin v. Express Co., 107 Ill. 443.

⁵ Rand v. Meir, 47 Iowa, 607; Seigwald v. Seigwald, 37 Ill. 430; Roseboom v. Roseboom, 81 N. Y. 356.

⁶ Stuart v. Walker, 11 Reporter,

there is a devise for life, in express terms, a power of disposal annexed cannot enlarge it to a fee;¹ nor is it opposed to any rule of law to create a life estate with a power to sell and convey, and limit a remainder after its termination.²

A conveyance by a devisee for life, but with an absolute power of disposal of the reversion, will vest in the grantee of such devisee an estate in fee,³ while in case the power has not been exercised, the land, on the death of such devisee, goes to the heirs of the devisor.⁴ An important distinction will, however, be observed between an absolute and unconditional power of disposal in the discretion of the devisee and a power restricting the disposition both as to time and manner. The devise of an estate for life, with authority in the devisee to dispose of same by last will and testament, does not convey absolute ownership;⁵ nor would the further fact that the will devising same charged the payment of the debts on the devisee be sufficient to enlarge the life estate to a fee-simple.⁶ The right of testamentary disposition is a mere power; and though the authorities are not altogether harmonious as to the right of the devisee to exercise such power by deed, it would yet seem that a warranty deed in fee-simple, executed by the devisee, which made no reference to the will by which the power of disposition was given, and contained no evidence of an intention to execute the

533; *Merrill v. Emery*, 10 Pick. 512; *Jarm. on Wills* (Bigelow), *879. A devise with power of disposition, although providing for an ultimate remainder of what remains undisposed of at the death of the first taker, will vest a fee, or a right to convey in fee. *Lyon v. Marsh*, 116 Mass. 232.

¹ *Hamlin v. Express Co.*, 107 Ill. 443.

² *Ward v. Amory*, 4 Curtis, 425; *Jarm. on Wills* (Bigelow), *873; *Welsch v. Savings Bank*, 94 Ill. 191; *Jassey v. White*, 28 Ga. 295; *Dow-*

ney v. Borden, 36 N. J. L. 460. A different rule prevails in some states. See *Hazel v. Hagan*, 47 Mo. 277.

³ *Funk v. Eggleston*, 92 Ill. 515; *Hazel v. Hagan*, 47 Mo. 277; *Levy v. Griffiths*, 65 N. C. 236; *Lyon v. Marsh*, 116 Mass. 232.

⁴ *Fairman v. Beal*, 14 Ill. 244.

⁵ *Bryant v. Christian*, 58 Mo. 98. And see *Terry v. Wiggins*, 2 Lans. (N. Y.) 272.

⁶ *Dunning v. Van Dusen*, 47 Ind. 423; *Jassey v. White*, 28 Ga. 295; *Jarm. on Wills* (Bigelow), *873.

power, would convey only the life estate of the devisee.¹ The question seems to turn upon the fact of intention in the donee of the power to execute it; and when there are co-existing interests, one within and the other without the power, it would seem that the intention to execute the power, whether by deed or will, must be apparent and clear; but that intention, however manifested, whether directly or indirectly, positively or by just implication, will, when established, render a conveyance by the devisee valid and operative.²

¹Dunning v. Van Dusen, 47 Ind. 423; Funk v. Eggleston, 92 Ill. 515. It may be laid down as a general rule, that in all cases where by the terms of the will there has been an express limitation of an estate to the first taker, for life, and a limitation over, any general expressions apparently giving the tenant for life an unlimited power over the estate, but which do not in express terms do so, must be regarded as referring to the life interest only, and therefore as limited by such interest. Welsch v. Bellville Savings Bank, 94 Ill. 191.

²Funk v. Eggleston, 92 Ill. 515. In this case the subject of a devise for life with power of disposition is very exhaustively treated in a learned and able opinion by Baker, J. The fundamental principle deducible from the English decisions is that there should be a certain ascertainment of the intention of the donee of the power to act under the power. Three classes of cases arose in which it was demonstrated to an absolute moral certainty there was an intention to execute the power, and these were: (1) when there was a reference to the power; or (2) to the subject or

property covered by the power; or (3) when the instrument would be inoperative without the aid of the power. The cases ranging themselves in one or the other of these three classes, it was judicially announced in some of the cases that there could be no execution of a power unless the case fell in one or the other of these three classes. See Sir Edward Clere's Case, 6 Coke, 17; Standen v. Standen, 2 Ves. Jr. 589. But in furtherance of the general rule that the intention of the testator (in case of disposition by will) is the pole-star to guide in the interpretation, the English rule, which requires the existence of one of the three elements above enumerated, is made altogether subordinate and secondary in its character, and if circumstances arise that indicate clearly the intention of the donee to work by the power, the artificial rule, predicated upon former experience, must give way, and the primary and fundamental rule, which requires only that the intention must be clear and manifest, will prevail. "The main point," says Mr. Justice Story (Blagge v. Miles, 1 Story, 427), "is to arrive

Indeterminate devise.—Owing to the liberal construction now accorded to wills as well as sweeping statutory enactments relative to the limitation of estates, fewer questions will now arise in regard to the quantity or duration of estates than formerly. Wills drawn by the testator, or holographic wills, frequently fail to express clearly such testator's intentions, and as they are usually copied from the ever-ready "form book" and adapted to his wants, they not infrequently fail to expressly define the nature or extent of the estate he seeks to convey.

A devise indeterminate in its terms and without words of limitation, which, standing alone and unaided by statute, would create only an estate for life, will be enlarged to a fee by the imposition of a charge upon the person of the devisee, or on the *quantum* of the interest devised to him;¹ but not if the premises are merely devised subject to a charge.² Where the charge is on the estate, and there are no words of limitation, the devisee takes an estate for life only;³ but where the charge is on the person of the devisee in respect of the estate in his hands, he takes a fee by implication.⁴ If the charge be on the person of the devisee, the amount is unimportant, if the sum is to be paid abso-

at the intention and object of the donee of the power in the instrument of execution, and that being once ascertained, effect is given to it accordingly. If the donee intends to execute, and the mode be in other respects unexceptionable, that intention, however manifested, will make the execution valid and operative." But the intention must be clear and apparent, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful under all the circumstances, then the doubt will prevent it from being deemed an execution of the power. *Blagge v. Miles*, 1

Story, 427; *Dunning v. Van Dusen*, 47 Ind. 423.

¹*Tracy v. Kilbourn*, 3 Cush. (Mass.) 557; *Baker v. Bridge*, 12 Pick. 27; *Barheydt v. Barheydt*, 20 Wend. 576.

²*Hawkins on Wills*, 134.

³*Fox v. Phelps*, 17 Wend. 393. By force of the statute a general devise will pass all the testator's estate, including the fee, unless a contrary intent fairly appears.

⁴*Jackson v. Bull*, 10 Johns. 148; *Funk v. Eggleston*, 92 Ill. 515; *Merritt v. Brantley*, 8 Fla. 226; *Cook v. Holmes*, 11 Mass. 528; *Wait v. Belding*, 24 Pick. 129.

lutely.¹ But this, it will be understood, applies only to indefinite devises. Where the estate is given for life in express terms, and some other determinate estate is expressly given or arises by necessary implication from the language of the devise over, the rule is inoperative to enlarge such an estate to a fee.²

Devise on condition precedent.—This frequently occurs where land is given on condition that the devisee pay certain legacies, or perform certain acts, etc., and performance of the conditions is essential to the vesting of the estate.³ Where the conditions are limited as to time, and are not performed within that time, the devise does not take effect,⁴ but becomes inoperative and void.

Conditional devise — Marriage.— Estates for life are frequently devised to surviving husbands or wives, subject to a defeasance in the event of a second marriage. Conditions in general restraint of marriage, whether of man or woman, as a general rule, are regarded in law as being against public policy and therefore void. But this rule has never been considered as extending to special restraints, such as against marriage with a particular person, or before attaining a certain reasonable age, or without consent. Nor has it ever been extended to the case of a second marriage of a woman; but in all such cases the special restraint by condition has been allowed to take effect, and the devise over held good on breach of the condition. A condition, therefore, that a widow shall not marry, is by all the authorities held not to be unlawful.⁵ A distinction is also made between those

¹ Collier's Case, 6 Rep. 16; 2 Jarm. on Wills, 171; Jackson v. Merrill, 6 Johns. 186; Barheydt v. Bardeydt, 20 Wend. 576; Jackson v. Harris, 12 Wend. 83.

² 2 Jarm. on Wills, 173; Groves v. Cox, 40 N. J. L. 40.

³ Nevius v. Gourley, 95 Ill. 206. A court of chancery will never vest an estate when, by reason of a condition precedent, it will not vest in law. *Id.*

⁴ Nevius v. Gourley, 97 Ill. 356 (second hearing); Den v. Messenger, 33 N. J. L. 490.

⁵ Bostick v. Blades, 15 Reporter, 399; 2 Powell on Devises, 283; Clark v. Tennison, 33 Md. 85.

cases where the restraint is made to operate as a condition precedent, and those where it is expressed to take effect as a condition subsequent, and the decisions have generally been made to turn upon the question whether there be a gift or devise over or not. But if the devise be to a person until he or she shall marry, and upon such marriage then over, this is a good limitation as distinguished from condition; as in such case there is nothing to carry the interest beyond the marriage. There can be no doubt, therefore, that marriage may be made the ground of a limitation ceasing or commencing, and this whether the devisee be man or woman, or other than husband and wife.¹

Continued — Contingent remainders.—Under devises similar to those mentioned in the preceding paragraph, the devise over, according to the phraseology used, will be either a vested or contingent remainder. The essence of a contingent remainder is, that it is limited to take effect on an event or condition that may never happen or be performed, or which may not happen or be performed until after the determination of the preceding particular estate.² Thus, where a devise over operates, at the death or marriage of the first devisee, to such of testator's children as shall then be living, this would give a contingent remainder to such of the children as were living when such contingency of death or marriage happened. The children of such testator who may have died after the testator and prior to the happening of the contingency would take no estate, nor would their heirs;³ and the fact that the words "to them, their heirs," etc., followed the mention of the children would not affect the result stated, for such words do not describe the devises but the quantity of their estate, and merely show the estate taken by the previous words to be a fee.⁴

¹ Bostick v. Blades, 15 Reporter, 399; Arthur v. Cole, 56 Md. 100; Brown v. Brown, 41 N. Y. 507.

³ Olney v. Hall, 21 Pick. 311; Emison v. Whitelsey, 55 Mo. 254.

⁴ Thompson v. Ludington, 104

² Bouv. Law Dict. 435.

Mass. 193.

Possible reversion.—A possibility of reversion may be created either by deed or will, but more frequently occurs under the latter. It is a possibility of reinvestiture in the grantor or his heirs, and occurs where a conveyance is made to one for life or years with a contingent remainder. Thus, in case of a devise to an unmarried woman, and to the "heirs of her body" or "children;" here the devisee named would take a life estate only, while a contingent remainder is created in favor of such heirs, who, when born, would take the fee. The will in such case effectually divests the heirs of the testator of all estate but a contingent reversion, dependent upon the devisee's dying without issue.¹

Devise to married woman.—The general rule of construction, in the absence of statutory provisions to the contrary, is, that in order to exclude the marital rights of the husband from attaching to property coming to the wife during coverture, or belonging to her at the time of marriage, an intention on the part of the testator to vest in the wife a separate estate ought to appear from the terms or provisions of the will so clearly as to be beyond the reach of reasonable controversy.² This is ordinarily accomplished by the insertion of technical words, as "sole and separate use," or other words of similar import, while the same end may be attained by provisions excluding the marital rights of the husband, or by giving to the wife powers concerning the estate inconsistent with the disabilities of coverture.³

Devises to executors in trust.—It is a rule in equity that the language employed in devises must be such as to show that the object is certain and well defined, and that the bene-

¹ *Frazer v. Supervisors Peoria Co.*, 74 Ill. 282; 2 Bl. Com. 164; *Blair v. Vanblarcum*, 71 Ill. 290. This reversionary interest may itself be the subject of devise (*Austin v. Cambridgeport*, 21 Pick. 215), and will pass under a residuary clause (*Steel v. Cook*, 1 Met. 281); and the

right to same may be asserted by the heirs of such residuary devisee after his death. *Clapp v. Stoughton*, 10 Pick. 462.

² *Schouler, Dom. Rel.* (2d ed.) 189; 2 *Perry on Trusts*, § 647; *Hill on Trustees*, 611.

³ *Vail v. Vail*, 49 Conn. 52.

ficiaries be either named, or capable of easy ascertainment within the rules of law which are applicable to such cases; and further, that the trusts be of such a nature that the court can direct their execution; failing in this the property will fall into the residue of the estate.¹

Devises in trust are frequently made to executors, the object being usually to promote some educational, charitable or religious purpose, the beneficiary being an institution devoted to the furtherance of those objects, though it is not uncommon to make beneficial devises to individuals in the same manner. It is usual, though not necessary, to specifically name or describe the intended beneficiaries, and numerous authorities sustain devises to executors or trustees which confer upon them authority to divide the same among such persons as they may select from certain classes which are designated, and among such children or relatives, who are intended to be provided for, whom they may deem proper.² Where, however, a devise is too indefinite to give certainty it will be void. Thus, a devise in trust for such object of benevolence and liberality as the trustee in his discretion shall approve, would have this effect.³ So, also, would a power of appointment to one to give or devise property "among such benevolent, religious or charitable institutions as he may think proper"⁴ be vague and indefinite. A power of disposition to such members of a specified branch of a family as the trustee might consider most deserving is void for the same reason.⁵ A direction to give a fund in "private charity" is too indefinite,⁶ or to give what they

¹ *Holmes v. Mead*, 53 N. Y. 332; *Powell on Devises*, 418; *Darling v. Rogers*, 22 Wend. 494; 2 Story, Eq. Jur., § 979; *Wheeler v. Smith*, 9 How. (U. S.) 55.

² *Power v. Cassidy*, 79 N. Y. 602; *Bull v. Bull*, 8 Conn. 48; *Norris v. Thompson's Ex'rs*, 19 N. J. Eq. 307; *McLoughlin v. McLoughlin*, 30 Barb. 458.

³ *Morice v. Bishop of Durham*, 10 Ves. (Eng.) 522.

⁴ *Norris v. Thompson's Ex'rs*, 19 N. J. Eq. 307.

⁵ *Stubbs v. Sargon*, 3 Myl. & Cr. (Eng. Ch.) 507.

⁶ *Ommanny v. Butcher*, 1 T. & R. (Eng. Ch.) 260.

might choose;¹ but when the beneficiaries are capable of identification, although not named, the trust will be valid; and a testator may commit to competent persons the power to designate who of certain persons shall participate in a specified portion of his estate, and in what proportions the property shall be divided.²

Bequest to devisee by description.—The observations of the last section are in a measure applicable to direct bequests, for a devisee, whether a corporation or a natural person, may be designated by description as well as by name.³ It is only necessary that the description of the devisee be by words that are sufficient to denote the person meant by the testator, and to distinguish him from all other persons.⁴ In such cases, however, a judicial construction is necessary in order to fully perfect the title of the imperfectly designated devisee, and the decree rendered upon such construction, together with the will, forms the basis of the devisee's claim of title. Devises to corporations are particularly subject to the rule above stated, as the testator frequently fails to insert the strictly legal name of the corporation through inadvertence, ignorance or mistake. Parol evidence is always admissible to remove latent ambiguities; and where there is no person or corporation in existence precisely answering to the name or description in the will, parol evidence may be given to ascertain who were intended by the testator.⁵

Precatory trusts.—Precatory trusts grow out of words of entreaty, wish, expectation, request or recommendation fre-

¹ Wetmore v. Parker, 52 N. Y. 450. Vt. 336; McAllister v. McAllister, 46 Vt. 272; Minot v. Curtis, 7

² Williams v. Williams, 4 Seld. 548; Owens v. Miss. Soc., 14 N. Y. 386; 2 Redf. on Wills, 779; White v. Fisk, 22 Conn. 31; Lefevre v. Lefevre, 59 N. Y. 434. Mass. 441; Holmes v. Mead, 52 N. Y. 332; Gardner v. Heyer, 2 Paige, 11.

³ Lefevre v. Lefevre, 59 N. Y. 434. ⁵ Lefevre v. Lefevre, 59 N. Y. 434; St. Luke's Home v. Ass'n for Indigent Females, 53 N. Y. 191.

⁴ Button v. Am. Tract Soc'y, 23

quently employed in wills, and the authorities, both English and American, are conclusive, and in the main harmonious, that a trust will be created by such words as "hope," "wish," "request," etc., if they be not so modified by the context as to amount to no more than mere suggestions, to be acted on or not according to the caprice of the immediate devisee, or negatived by other expressions indicating a contrary intention, and the subject and object be sufficiently certain.¹ An absolute gift to one person, accompanied with a request to appropriate a particular sum to another person, creates in the immediate devisee a trusteeship to the extent of such sum; nor does the absolute gift contravene either an express or implied trust annexed to the gift, as it is a common thing to invest the legal title and trusteeship in the same person, who is to receive the benefit in the event of the failure of the trust. It is equally well settled, however, that a mere direction by a testator that a devisee shall pay a legacy does not thereby create a charge on the land, and, to accomplish this, there must be express words or necessary implication from the whole will that such was the intention.²

There has been a tendency manifested by some courts to restrict the application of this rule or to qualify it, and, in some instances, to reject it altogether, and to adopt, as more reasonable, the presumption that words precatory in form are meant to imply a discretion in the donee, and should be so construed unless clearly shown to be used in an imperative sense from other parts of the will;³ but the weight of authority sustains the principles first stated, and precatory words are generally held to be creative of trusts, when the

¹ *Bohon v. Barret's Ex'r*, 79 Ky. 614; *Chapin v. Gilbert*, 19 Conn. 378; *Hill on Trustees*, 92; *Perry* 342; *Pennock's Estate*, 20 Pa. St. 268; *Walter's Appeal*, 95 Pa. St. 305; *Taylor v. Dodd*, 58 N. Y. 335; *Conn. 342.*

² *Cable's Appeal*, 9 Reporter, 57; *Read v. Cather*, 18 W. Va. 263.

Lupton v. Lupton, 2 Johns. Ch. ³ *Pennock's Case*, 20 Pa. St. 272.

contrary does not appear from the context or by necessary implication.¹

Perpetuities.— Attempts are frequently made in wills (though seldom in deeds) to create what the law regards as *perpetuities*, and this occurs whenever there is a suspension of the power of alienation for a longer period than a life or lives in being at the creation of the estate,² or of such lives in being and twenty-one years and nine months at the farthest,³ the rule varying somewhat in different states. In construing dispositions of property with reference to the statute against perpetuities, the rule is settled that any limitation is void as in violation of that statute by which the suspension of the power of alienation will not necessarily, under all possible circumstances, terminate within the prescribed period. It is not enough that it *may* terminate; it *must*, and if by any possibility the vesting of the estate may be postponed beyond the statutory period, the limitation will be void.⁴ In all cases where the limitation is void as being too remote, the will should be construed as if no such clause were in it, and the first taker will hold his estate discharged from the limitation over.⁵

Lapsed devise.— When a devisee named in a will dies during the life-time of the testator, the devise is said to *lapse*, and does not go to the heirs of such deceased devisee, but falls back into the estate of the testator. The rule, though frequently acknowledged to be productive of great hardship, and to be often contrary to the intention of the testator, is too firmly established to be questioned. It is regarded as a rule of necessity, and merely amounts to this: That if there be no devisee, there is in effect no devise.⁶

¹ Reed's Adm'r v. Reed, 30 Ind. 313; Warner v. Bates, 98 Mass. 274. Stephens v. Evans, 30 Ind. 39; Lorrillard v. Coster, 5 Paige, 172; Haw-

² Schettler v. Smith, 41 N. Y. 328; ley v. Northampton, 8 Mass. 3.

Knox v. Jones, 47 N. Y. 389.

⁵ Wood v. Griffin, 46 N. H. 234;

³ Stephens v. Evans, 30 Ind. 39.

Anderson v. Grable, 1 Ark. 136.

See 1 Jarm. on Wills, 226.

⁶ Davis' Heirs v. Taul, 6 Dana, 52.

⁴ Schettler v. Smith, 41 N. Y. 328;

Devises for the payment of debts.— Land devised to trustees for the payment of debts and legacies is usually regarded in equity as money,¹ but the heir at law has a resulting trust in such land after the debts and legacies are paid, and may restrain the trustee from selling more than is necessary to pay such debts and legacies; or may pay them himself and have conveyance of that portion of the land not sold in the first case, and the whole in the latter, which property will, in either case, be land and not money.² Equity will extend the same privilege to the residuary legatee.³ A mere charge upon land stands upon a different footing, and the executor possesses no power to sell or dispose of the land in such case except by license or direction of the probate court.⁴ The land in the hands of the devisee is burdened by the charge,⁵ and should he renounce the devise such land will descend to the heir at law subject to the charge;⁶ but the executor, having no *status* as a trustee, takes no interest in same, and no power can be implied from the mere charge of the debts and legacies upon the lands devised.⁷

Charges on lands devised.— Real estate is not as of course charged with the payment of legacies. It is never so charged unless the testator intended it should be, and that intention must be either expressly declared, or fairly and satisfactorily inferred from the language and dispositions of the will.⁸ Mere directions to pay debts and legacies are not sufficient to create a charge;⁹ but where the testator devises his real estate after payment of debts and legacies, or with a direction that debts and legacies be first paid, then the real estate is charged with the payment of them and they become a lien upon the

¹ *Craig v. Leslie*, 3 Wheat. 463; *Story, Eq.*, § 552; *Dill v. Wisner*, 88 N. Y. 153.

² *Craig v. Leslie*, 3 Wheat. 463.

³ *Craig v. Leslie*, 3 Wheat. 463.

⁴ *Dill v. Wisner*, 88 N. Y. 153.

⁵ *Gridley v. Gridley*, 24 N. Y. 130; *Harris v. Fly*, 7 Paige, 421.

⁶ *Birdsall v. Hewlett*, 1 Paige, 32.

⁷ *In re Fox*, 52 N. Y. 530.

⁸ *Okeson's Appeal*, 59 Pa. St. 99; *Kirkpatrick v. Chestnut*, 5 S. C. 216; *Lupton v. Lupton*, 2 Johns. Ch. 614; *Cable's Appeal*, 9 Reporter, 57. Legacies are primarily payable out of the personal estate.

⁹ *Taylor v. Dodd*, 58 N. Y. 335; *Walter's Appeal*, 95 Pa. St. 305.

land.¹ If the devisee accepts the devise, he becomes personally liable for the legacies,² which still remain, however, a charge upon the land.³ When the same sentence or clause by which land is devised imposes on the devisee the duty of paying an annuity, and no other fund is provided out of which the payment is to be made, the annuity is a charge upon the land;⁴ and in like manner, where a testator, without creating an express trust to pay legacies, makes a general residuary disposition of his whole estate, blending the realty and personalty together in one fund, the real estate is constructively charged with the legacies.⁵ In every instance, therefore, where legacies are directly or constructively charges or liens upon the realty, satisfactory assurance must be given that the legacies have been paid or the lien released before the title is accepted by a purchaser from the devisee. In this connection an important distinction should be noted, with regard to the estate possessed by the devise, between such legacies as constitute a personal charge upon the devisee, and such as are expressly charged upon the estate. Where an estate is devised subject to the payment of legacies, if the legacies are made a personal charge upon the devisee, an acceptance of the devise operates to make such legacies a personal liability of the devisee, while he will take the estate devised as a purchaser in fee; but if the legacies are charged upon the estate devised, the devisee does not take as a purchaser, but as a beneficial devisee.⁶

¹ Lupton v. Lupton, 2 Johns. Ch. 614; Wood v. Sampson, 25 Gratt. (Va.) 845.

² Birdsall v. Hewlett, 1 Paige, 33; Burch v. Burch, 52 Ind. 136.

³ "It seems to be well settled," says Mr. Redfield, "that where lands are held by subsequent *bona fide* purchasers for value, but who are obliged to trace title through a devise, whereby a charge is created upon the land for the payment of legacies, such purchasers will be constructively affected with notice

of such charge, and equity will enforce it upon the land in their hands." 2 Redf. on Wills, *210, citing Harris v. Fly, 7 Paige, 421; Wallington v. Taylor, Saxton, 314. And see Aston v. Galloway, 3 Ired. Eq. (N. C.) 126.

⁴ Merrill v. Bickford, 65 Me. 118.

⁵ Lewis v. Darling, 16 How. 1; Nichols v. Postlethwaite, 2 Dall. 131; Hill on Trustees, 860; Gallagher's Appeal, 48 Pa. St. 121.

⁶ Funk v. Eggleston, 92 Ill. 515.

Equitable conversion.—It is a fundamental principle in equity, long established and universally recognized, that where the testator directs that his real property be converted into money on or before a given time, it becomes, at law, money, and will be treated as personalty from the moment of his death. In such case, therefore, the heir takes no interest in the land, which is held by the executor as other personal property, and can make no conveyance of same that will defeat or impair the rights of a purchaser from the executor. Yet, to effect this change the intention of the testator must appear by unequivocal declaration. There must be an imperative and unmistakable direction to sell; and if the power to sell, or the sale itself is coupled with terms or dependent upon a contingency, there is no conversion until the terms have been complied with or the contingency has happened; and, as courts are always averse to sanctioning a change in the quality of an estate, if there be any doubt as to the intention of the testator the original character of the property will be retained.¹

3. *Proof of Wills.*

Generally.—Before a will can take effect or become operative as a conveyance it must, in some manner, be established as the act and deed of the testator. Formerly much laxity prevailed with respect to the proof of wills. No special means of legal authentication were provided; and though it became a common practice, where title depended upon a devise, to prove the execution of the will in chancery, yet this was not considered necessary to perfect title any more than it would be to prove the execution of a deed.² For many years, however, courts have been provided with special jurisdiction in the matter of wills and decedents' estates, and to them must be referred all testamentary writings, such reference being technically known as a *probate*.

¹Orrick v. Boehm, 49 Md. 104; ²Cruise, Dig., tit. 38, ch. V.
Peter v. Beverly, 10 Pet. (U. S.) 533.

Probate of wills.—Probate of a will has been defined as the proof, before an officer authorized by law, that an instrument offered to be proved or recorded is the last will and testament of the deceased person whose testamentary act it is alleged to be.¹ It is the authentication of the instrument, and that which gives to it its legal effect and validity as a conveyance.² A will, therefore, which has not been admitted to probate, though admissible, perhaps, in connection with proof of adverse possession, is not evidence of title in a court of law,³ nor would it afford constructive notice if recorded.

Effect of probate.—The probate of a will, if decreed by a court of competent jurisdiction, establishes the facts: (1) that the testator at the time of executing the instrument was of sound and disposing mind and memory, capable of understanding the act he was doing, and the relation in which he stood to the object of his bounty, and to the persons to whom the law would have given his property if he had died intestate; (2) that the instrument was executed without fear, fraud or undue influence by which his own intentions were controlled and supplanted by those of another; (3) that he executed the instrument *animo testandi*, with an understanding and purpose that it should be his last will and testament;⁴ and (4) it is presumptive evidence of the death of the person whose will it purports to establish.⁵ Such decree is generally regarded as in the nature of a judgment *in rem*,⁶ and in the absence of statutory provisions is conclusive as against all the world as to the validity of the will,⁷ and affirms the

¹ 2 Bouv. Law Dict. 378; Pettit v. Black, 15 Reporter, 90.

² Armstrong v. Lear, 12 Wheat. 175.

³ Willamette, etc. Co. v. Gordon, 6 Oreg. 175; Wood v. Matthews, 53 Ala. 1; Pitts v. Melser, 72 Ind. 469; Shumway v. Holbrook, 1 Pick. 114; Ochoa v. Miller, 59 Tex. 460; Pettit v. Black, 13 Neb. 142.

⁴ Barker v. Comins, 110 Mass. 477.

⁵ Carroll v. Carroll, 6 Thomp. & C. (N. Y.) 294; Belden v. Meeker, 47 N. Y. 307.

⁶ Hall v. Hall, 47 Ala. 290; Crippen v. Dexter, 13 Gray (Mass.), 330; State v. McGlynn, 20 Cal. 233.

⁷ Brock v. Frank, 5 Ala. 85; Janes v. Williams, 31 Ark. 175; Tucker v. Whitehead, 58 Miss. 762; In re

title of the beneficiary under it from the time of the testator's death, relating back so as to make valid whatever has been previously done, which, under the will, after probate, the beneficiary could lawfully have done.¹

But though probate establishes the sufficiency of the will, and confirms the claims of those holding under it, so far as to make it evidence of title, it does not determine the title to the property, nor establish the validity of any devise given by it, the will having no greater effect after probate than any other legal conveyance.²

Foreign probate.—In order to entitle a devisee of lands under a will probated in a foreign jurisdiction to deduce legal title to same in the courts of the state where the land is located, it is necessary that the will be also probated in the local courts. This matter is governed by statute, which generally provides that the copy of the will presented must be accompanied by the foreign probate and due authentication thereof, these together constituting the one instrument or subject-matter to be acted upon under the statute; and all are, as a rule, essential to authorize the probate court to exercise jurisdiction.³ Whenever this ancillary probate is resorted to it is generally allowed as a matter of course and without inquiring into the validity of the will or the sufficiency of proofs upon which the court granting the original probate acted, provided such original probate was granted by a court of competent jurisdiction and is properly authenticated.⁴

Williams, 1 Lea (Tenn.), 529; Orr v. O'Brien, 55 Tex. 149.

¹ Stuphen v. Ellis, 35 Mich. 446; Allaire v. Allaire, 37 N. J. L. 312; Dublin v. Chadbourn, 16 Mass. 433.

² Fallon v. Chidester, 46 Iowa, 588; Greenwood v. Murray, 26 Minn. 259; Ware v. Wisner, 4 McCrary (C. Ct.), 66.

³ Pope v. Cutler, 34 Mich. 150; Ward v. Oates, 43 Ala. 515.

⁴ Brock v. Frank, 51 Ala. 89; Aperson v. Bolton, 29 Ark. 418; Newman v. Willetts, 52 Ill. 98; Russell v. Hart, 87 N. Y. 19; Markwell v. Thorne, 28 Wis. 548.

INDEX.

The references are to the pages.

ACCRETION —

definition, nature and operation, 92.

ACKNOWLEDGMENT —

of deeds, when required, 180.

formal requisites of, 181.

not required for ancient deeds, 183.

of sheriff's deed, necessity for, 280.

ADMINISTRATOR —

with will annexed, deeds of, 275.

ADOPTION —

defined and considered, 77.

ADVERSE POSSESSION —

nature of title acquired by, 107.

essentials of, 108.

ADVERSE SEIZIN —

will not prevent valid conveyance of land, 153.

AFFINITY —

defined and distinguished, 76.

ALIENS —

right of to inherit, 75.

right of to take by deed, 135.

ALLEGIANCE —

does not relate to title or imply feudal obligations, 45.

ANCESTOR —

covenants of bind heir, when, 69.

debts of, affect heir, how, 70.

ANCESTRAL ESTATES —

by what rule distributed, 74.

ANCIENT DEEDS —

rules as to proof of, 183.

APPURTENANCES —

defined and considered, 15.

ARRANGEMENT —

of the orderly parts of a deed, 126.

ASSIGNMENT —

deed of, nature and operation, 225.

for benefit of creditors, 226.

of mortgage, how made, 257.

formal requisites of, 253.

of lease — subtenancy, 268.

ATTESTATION —

of deeds, nature and effect, 179.

of wills, what required, 291.

ATTORNEY IN FACT —

appointment and powers of, 230.

execution of power by, 232.

substitution of, 232.

revocation of power of, 231.

AUTRE VIE —

estates per, what are, 27.

AVULSION —

defined, nature and operation, 94.

BURIAL LOTS —

nature of a grant of, 22.

CESSION —

title by, described, 66.

CHATTELS REAL —

what are, 263.

requisites of conveyances of, 263.

CHILDREN —

is a word of purchase and not limitation, 299, 301.

CHURCH PEWS —

as subjects of property, how regarded, 12.

CLASS —

effect of a devise to, 305.

CODICIL —

to will, defined and described, 292.

COLOR OF TITLE —

defined and distinguished, 108.

CONDITIONAL ESTATES —

origin and nature, 46.

defined and classified, 47.

CONDITIONAL LIMITATIONS —

- distinguished from conditions, 51.
- in wills, effect of, 310.

CONDITIONS —

- annexed to land, effect of, 46.
- in deeds, construction of, 170.
 - how created, 171.
 - operation and effect of, 173.
- in restraint of alienation, 174.
- devise upon, effect of, 310.

CONFIRMATION —

- nature and operation as a form of grant, 88.
- deeds of, nature and operation, 224.
- of judicial sales, effect of, 284.

CONFISCATION —

- nature and effect of, 98.

CONQUEST —

- title by, described, 66.

CONSANGUINITY —

- definition and nature of, 71.

CONSIDERATION —

- in deeds, nature and effect of, 145.

CONSTRUCTION —

- of deeds, rules for, 149.
- of covenants in deeds, 165.
- of patents and public grants, 204.
- of wills, rules for, 294.

CONVEYANCE —

- by deed, generally considered, 124.
- forms of, 198.

CONVEYANCES —

- by the government, 199.
- by individuals, 213.
- derived from the statutes of uses, 214.
- derived from the common law, 222.
- by delegated authority, 228.
- in trust, 234.
- by way of pledge, 239.
- of chattels real, 263.
- of a testamentary nature, 289.

COPARCENERS —

- relation of, how created, 76.

CORPORATIONS —

- considered as parties to deeds, 131.
- devise to, how construed, 314.

CORPORATION STOCK —

- not regarded as real property, 13.

CORPOREAL HEREDITAMENTS —

- defined and classified, 3.

COVENANTS —

- in deeds, rules with respect to, 162.
- how created, 163.
- construction of, 165.
- defined and classified, 166.
- run with the land, when, 168.
- in mortgages, effect of, 252.
- in leases, when improved, 267.

CURTESY —

- estate of, what is, 31.

DATE —

- of deed, immaterial to its operation, 191.

DECLARATION —

- of trust, form of, 236.
- of revocation of will not sufficient, 293.

DEDICATION —

- defined and classified, 86.
- by plat, requisites of, 121.

DEED —

- as a form of private grant, 85.

DEEDS —

- form and incidents of, 124.
- writing and arrangement of, 126.
- parties to, generally considered, 123.
- of general warranty, 216.
- of quitclaim, 217.
- of special warranty, 220.
- statutory forms, effect of, 221.
- of release, 223.
- of confirmation, 224.
- of surrender, 225.
- of assignment, 225.

DEGREES —

- of consanguinity, as per common law, 73.

DELIVERY —

- of deeds, necessity for, 183.
 - theory of, 184.
 - mauner of, presumptions, 184.
- evidence of by registration, 185.
- how affected by revocation and redelivery, 186.
- in escrow, effect of, 187.
- of patents, not required, 202.

DESCENT —

- title by, defined, 68.
 - through consanguinity, 71.
 - through affinity, 76.
 - through adoption, 77.
- rules of, defined by statute, 71.

DESCRIPTION —

- in deeds, how construed, 149, 151.
- of exceptions and reservations, 152.

DEVISE —

- considered as a form of title, 89.
- to heirs, effect of, 297.
- to a class, how construed, 305.
- with power of disposition, 306.
- in indeterminate words, construction of, 309.
- on condition, effect of, 310.
- to married women, 312.
- to executors in trust, 312.
- will lapse, when, 316.
- for payment of debts, 317.

DISCOVERY —

- title by, described, 65.

DOWER —

- nature and incidents of, 29.

EASEMENTS —

- nature and characteristics of, 16.
- how created and extinguished, 18.

EMINENT DOMAIN —

- nature and exercise of the power, 95.

ENTIRETY —

- estates by, nature of, 40.

EQUITABLE CONVERSION —

- general doctrine of, 319.

ESCHEAT —

- nature and incidents of, 97.

ESCROW —

delivery of deeds in, effect of, 187

ESTATES —

defined and classified, 23.

of freehold, what are, 25.

in fee-simple, 25.

in fee-tail, 26.

for life, forms of, 27.

less than freehold, 33.

for years, 34.

at will, 35.

by sufferance, 35.

in remainder, nature of, 37.

in reversion, nature of, 38.

in joint-tenancy, how created, 39.

by entirety, 40.

in common, 42.

absolute and on condition, 44, 47.

raised in equity, what are, 52.

merger of, how effected, 57.

in fee-simple, what words raise, 299.

how affected by rule in Shelly's Case, 300.

ESTOPPEL —

defined and classified, 102.

by record, what is, 103.

by deed, what is, 103.

equitable doctrine of, 104.

ESTOVERS —

definition of, 28.

EXCEPTIONS AND RESERVATIONS —

from grants of land, how made, 152.

EXECUTION —

sheriff's deed under, 279.

nature of title derived by, 278.

EXECUTOR —

deeds and conveyances by, 274.

EXECUTORS AND ADMINISTRATORS —

as parties to conveyances, 143.

FEE-SIMPLE —

estates in, nature and qualities of, 25.

how created by deed, 155.

by will, 300.

FEE-TAIL —

estates in, defined, 26.

FIXTURES —

defined and described, 8.

rule for determination of, 9.

FORFEITURE —

as a method of acquiring title, 99.

FRANCHISES —

of what consisting, 21.

FREEHOLD ESTATES —

defined and classified, 25.

FUTURE ESTATES —

rules with respect to, 160.

GRANT —

title by, defined, 80.

operative words of, in deeds, 192.

in wills, 298.

GROWING CROPS —

pass under a deed of land, when, 6.

GUARDIANS —

as parties to conveyances, 144.

deeds and conveyances by, 287.

GUARDIANS AD LITEM —

excepted from the disabilities of trustees, 277.

HABENDUM —

in deeds, office of, 194.

HEIRS —

considered as a word of purchase in deeds, 155.

in wills, 299.

HOMESTEAD —

nature and characteristics of, 32.

HOUSES AND BUILDINGS —

in place, regarded as land, 7.

ICE —

may be considered as land, when, 11.

IMBECILES —

may be parties to deeds, when, 140.

IMPLIED COVENANTS —

in leases, when are, 267.

INCORPOREAL HEREDITAMENTS —
of what consisting, 14.

INDIAN TITLE —
to lands in United States, nature of, 64.

INFANTS —
as parties to deeds, 136.

ISSUE —
construction of as a word of purchase and limitation, 299.

JOINT-TENANCY —
nature of estates in, 39.

JUDICIAL SALES —
validity and effect, 282.
title derived under, 283.
necessity of confirmation of, 284.

LAND —
legal signification of, 4.

LANDLORD AND TENANT —
relation of defined, 264.

LEASE —
defined, 264.
property subject to, 266.
covenants and conditions in, 266.

LEGAL MEMORY —
period of, what is, 106.

LEGISLATIVE ACTS —
effect of as forms of public grant, 83.

LEGISLATIVE GRANTS —
construction and effect of, 205.

LICENSES —
nature and effect of, 20.

LIFE ESTATES —
defined and classified, 27.
how created by deed, 156.

LIMITATION —
defined and distinguished, 106.
words of, in deeds, in wills, 299.

LUNATICS —
effect of deeds of, 138.

MANURE —

may be considered as land, when, 7.

MAP —

of township subdivision, 114.

of sectional subdivision, 115.

MARRIED WOMEN —

considered as parties to deeds, 138.

devise to, effect of, 312.

MEANDER LINES —

how run and for what purpose, 118.

MERGER —

of estates, doctrine of, 57.

MINERALS —

when regarded as land, 4.

MINISTERIAL OFFICERS —

conveyances by, form and effect of, 279.

MORTGAGEE —

deeds by, effect of, 273.

MORTGAGES —

origin and history, 239.

operation and effect of, 241.

distinguished from trust deeds, 244.

equitable, what are, 245.

vendor's lien amounts to, when, 248.

statutory forms, effect of, 248.

for purchase-money, effect of, 249.

of homestead, how executed, 249.

of after-acquired property, 250.

effect of informality in, 251.

effect of covenants in, 252.

conditions and stipulations in, effect of, 253.

record of, effect of, 254.

assignment of, how made, 257.

release and satisfaction of, 260.

marginal discharge of, 262.

foreclosure of, how made, 263.

MORTMAIN —

statutes of, described, 132.

NON-CLAIM —

deed of, what is, 220.

OCCUPANCY —

title by, what is, 64.

OFFICIAL CONVEYANCES —

defined and classified, 269.

OILS AND GASES —

nature and legal characteristics of, 5.

PARCELING —

of land, generally considered, 112.

PARTIES —

to deeds of conveyance, 128.

persons *sui juris*, 130.

persons under disability, 135.

persons incompetent, 138.

fiduciaries, 141.

PARTNERS —

deeds and conveyances by, 130.

PATENT —

as a form of public grant, 81.

PATENTS —

defined, 200.

from the United States, 201.

from the state, 205.

PERPETUITIES —

rule with respect to, in deeds, 174.

in wills, 316.

PLATS AND SUBDIVISIONS —

how made, 119.

requisites and registration of, 120.

vacation and cancellation of, 121.

PLEDGE —

conveyances by way of, 239.

POWERS —

defined and classified, 56.

deeds executed under, 223.

of attorney, 230.

of appointment, 234.

revocation of, 231.

execution of, by attorney, 232.

POWER OF SALE —

in mortgages, how exercised, 255.

POWERS OF ATTORNEY —

- nature and exercise of, 230.
- revocation of, 231.
- execution of, 232.

PRESCRIPTION —

- defined and distinguished, 105.

PROBATE —

- of wills, how made, 319.
- effect of, 320.

PROFITS A PRENDRE —

- defined and illustrated, 19.

PROOF OF WILLS —

- how made and effect of, 319.

PUBLIC CONVEYANCES —

- general forms of, 199.
- of proprietary lands, 200.
- of forfeited lands, 207.

PUBLIC DOMAIN —

- how surveyed and divided, 113.

PURCHASE —

- considered as a form of title, 80.
- words of, in deeds, 155.
- in wills, 299.

PURCHASER —

- must see to application of purchase-money, when, 272.
- trustee cannot be, when, 276.

QUITCLAIM DEEDS —

- form and operation of, 217.
- effect of covenants in, 219.

REAL PROPERTY —

- nature and characteristics of, 1.
- estates in, defined, 23.
- title to, defined and classified, 59.

RECORDS —

- of deeds, afford notice, when, 189.
- loss of, affects title how, 191.
- of the general land office, 203.
- of mortgages, effect of, 254.

RECTANGULAR SURVEYING —

- exposition of the system of, 117.

REDEMPTION —

equity of, in mortgages, 243.

REGISTRATION —

of plats and subdivisions, 120.

of deeds, nature and effect, 188.

of patents, effect of, 203.

RELATION —

doctrine of, of what consisting, 110.

RELEASE —

deed of, form and operation, 223.

and satisfaction of mortgage, 260.

form and requisites of, 260.

of lien by trustees, 261.

RELINCTION —

considered as a form of title, 94.

REMAINDER —

estates in, defined, 37.

how created in wills, 304.

REPUGNANCY —

in deeds, how construed, 195.

in wills, effect of, 296.

RESTRICTION —

on the use of property, effect of, 49.

REVERSION —

estates in, defined, 38.

REVOCATION —

of deed, effect of, 186.

of power of attorney, 231.

of wills, how effected, 293.

RULES —

of descent as fixed by statute, 71.

SATISFACTION —

of mortgage, defined and distinguished, 260.

SEALING —

of deeds, effect of, 177.

method of, 178.

SECTIONS —

of public lands, how divided, 115.

SHELLEY'S CASE —

the rule in, stated, 158.

applied to wills, 300.

SHERIFF'S DEED —

on execution — form and effect of, 279.

SIGNATURE —

to deeds, effect of, 175.

method of affixing, 176.

STIPULATIONS —

in mortgages, effect of, 253.

SUB-TENANT —

how constituted, 268.

SUCCESSION —

right of, by heir, 73.

by adoptive heir, 79.

SURRENDER —

deed of, form and operation, 225.

SURVEYING —

American system of, described, 117.

TAX DEEDS —

form and requisites of, 209.

TAX TITLES —

nature and characteristics of, 100.

TECHNICAL PHRASES —

general rules for construing, 196.

in wills, how construed, 301.

TERMS —

of years, how created, 265.

TESTAMENTARY CONVEYANCES —

nature and operation of, 239.

TITLE —

defined and classified, 59.

original, what is, 60.

sources and classes of, 63, 66.

derivative, defined and classified, 67.

by descent, 68.

by purchase, 80.

TOWNSHIP —

how surveyed and subdivided, 114.

TREES AND HERBAGE —

annexed to the soil, are land, 6.

TRUST —

- conveyances in, 234.
- creation of, 235.
- declaration of, how made, 236.

TRUSTS —

- origin and history of, 54.
- how created, 234.
- resulting, what are, 237.

TRUSTEES —

- definition, powers and duties, 142.
- appointment of, 234.
- removal or substitution of, 238.
- resignation of, 239.
- conveyances by, nature and operation, 271.
- cannot become purchasers of trust property, 276.

TRUST DEEDS —

- nature and operation of, 244.
- release of by trustee, 261.

USES —

- history and nature of, 53.

VACATION —

- of plats and subdivisions, 121.

VALIDITY —

- of deeds, questions of discussed, 194.

VOLUNTARY ASSIGNMENTS —

- nature, effect, and requisites of, 226.

WARRANTY —

- covenant of, extends to what, 167.
- of title, in quitclaim deeds, effect of, 219.
- how construed in statutory deeds, 221.
- implied from words of grant, 216.

WARRANTY DEED —

- form and operation of, 216.

WASTE —

- defined and classified, 28.

WATER —

- rights of property in, 10.

WILLS —

- making and revocation of, 290.
- operation and effect of, 294.
- proof of, how made, 319.

WITNESSES —

- to deeds, effect of, 179.
- to wills, when required, 291.

WORDS —

- of grant, in deeds, 192.
 - in wills, 298.
- of purchase and limitation, 299.
- and phrases in wills, interpretation of, 301.
- which raise estates in deeds, 155.
- which pass real estate in wills, 302.

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